(14)

No. 96-795-CFX
Status: GRANTED

Title: Allentown Mack Sales and Service, Inc., Petitioner
v.
National Labor Relations Board

Docketed:
November 22, 1996

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Shawe,Stephen D.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 7 1996	G	Application (A96-94) to extend the time to file a petition for a writ of certiorari from August 19, 1996 to October 18, 1996, submitted to The Chief Justice.
2	Aug 8 1996		Application (A96-94) granted by the Chief Justice extending the time to file until September 18, 1996.
3	Nov 19 1996	G	Petition for writ of certiorari filed. (Response due January 22, 1997)
6	Dec 20 1996		Brief amicus curiae of Chamber of Commerce of the United States of America filed.
5	Dec 23 1996		Order extending time to file response to petition until January 22, 1997.
7	Jan 22 1997		Brief of respondent National Labor Relations Board in opposition filed.
8	Jan 22 1997		LODGING consisting of ten copies of brief submitted to the National Labor Relations Board, Seventh Region submitted by the Solicitor General.
9	Feb 3 1997		Reply brief of petitioner Allentown Mack Sales and Service, Inc. filed.
10	Feb 5 1997		DISTRIBUTED. February 21, 1997 (Page 1)
12	Feb 24 1997		REDISTRIBUTED. February 28, 1997 (Page 12)
13	Mar 3 1997		Petition GRANTED. SET FOR ARGUMENT October 15, 1997. **********
14	Apr 17 1997		Brief amicus curiae of Chamber of Commerce of the United States of America filed.
15	Apr 17 1997		Brief amicus curiae of Labor Policy Association filed.
16	Apr 17 1997		Joint appendix filed.
17	Apr 17 1997		Brief of petitioner Allentown Mack Sales and Service, Inc. filed.
18	Apr 17 1997		Brief amicus curiae of American Trucking Associations filed.
20	May 1 1997		Order extending time to file brief of respondent on the merits until June 12, 1997.
23	Jun 4 1997		Record filed.
		*	Original agency record National Labor Relations Board (BOX).
21	Jun 12 1997		Brief of respondent National Labor Relations Board in opposition filed.
22	Jun 12 1997		Brief amicus curiae of AFL-CIO filed.
24	Jun 30 1997	G	Application (A97-18) to extend the time to file a reply brief from July 15, 1997 to July 29, 1997 by petitioner, submitted to The Chief Justice.
25	Jul 3 1997		Application (A97-18) granted by the Chief Justice

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No. 96-795-CFX

Entry	Date	Note	Proceedings and Orders
			extending the time to file until July 29, 1997.
26	Jul 28 1997		CIRCULATED.
27	Jul 29 1997	X	Reply brief of petitioner Allentown Mack Sales and Service, Inc. filed.
28	Aug 22 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the District of Columbia Circuit.

(1)

96 795

No. ____

In The

Supreme Court of the United States

October Term, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

EARLE K. SHAWE *
STEPHEN D. SHAWE
ERIC HEMMENDINGER
ELIZABETH TORPHY-DONZELLA
SHAWE & ROSENTHAL
Sun Life Building
20 S. Charles Street
Baltimore, MD 21201
(410) 752-1040

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTION FOR REVIEW

Whether the National Labor Relations Board erred in holding that a successor employer cannot conduct a poll to determine whether a majority of its employees support a union unless it already has obtained so much evidence of no majority support as to render the poll meaningless?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Allentown Mack Sales and Service, Inc.,[1] respectfully petitions the Supreme Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review a judgment enforcing an order of the National Labor Relations Board. In addition to Allentown Mack and the General Counsel, the parties in the Board proceeding included Local Lodge 724, International Association of Machinists and Aerospace Workers, AFL-CIO. The union did not participate in the Court of Appeals proceeding.

OPINIONS BELOW

The Decision of the Court of Appeals is reported at 83 F.3d 1483, 152 L.R.R.M. (BNA) 2257 (D.C. Cir. 1996) (Appendix A). The Board's decision, including the Administrative Law Judge's decision, is reported at 316 N.L.R.B. 1199, 149 L.R.R.M. (BNA) 1051 (1995) (Appendix B).

JURISDICTION

The Court of Appeals issued its decision May 21, 1996. (App. 1.) The Court of Appeals denied Allentown Mack's Petition for Rehearing and Suggestion for Rehearing In Banc on September 13, 1996. (App. 65, 66.) On

[1] Allentown Mack is not publicly traded and has no parent or subsidiaries.

October 24, 1996, the Court of Appeals issued an Order granting Allentown Mack's motion for a 30-day stay of mandate. (App. 68.) The Supreme Court has jurisdiction to issue a writ of certiorari under Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) and 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 7 of the National Labor Relations Act states, in part, that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from any and all such activities." 29 U.S.C. § 157.

Section 8(a)(1) of the Act states that "It shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1).

Section 8(a)(5) of the Act states that "It shall be an unfair labor practice for an employer – (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a)(5).

STATEMENT OF THE CASE

Petitioner, Allentown Mack Sales and Service, Inc., was formed by three managers of Mack Trucks, Inc.'s dealership and repair shop in Allentown, Pa., to purchase the assets of the business. (App. 2.) Allentown Mack

hired 32 of the 45 employees previously employed by Mack Trucks, Inc. (App. 2.) Local Lodge 724, International Association of Machinists and Aerospace Workers, AFL-CIO, had represented employees of Mack Trucks, Inc.'s sales and parts departments since 1973. (App. 28.)

During the period immediately before and after the sale, which was effective December 21, 1990, seven employees made unequivocal statements that they no longer supported the union. (App. 2, 52.) One of the seven also stated that the "entire night shift" (which consisted of six or seven employees) did not want the union. (App. 2, 51.) Another employee, Ron Mohr – who was a member of the union's bargaining committee and the shop steward for the service department, where 23 of the 32 employees worked – told management, "with a new company, if a vote was taken, the union would lose and that it was his feeling that the employees did not want a union." (App. 53.)[2]

The seven employees expressed rational reasons for no longer wishing to be represented. Thus, for example, Milt Solt thought that the union was a waste of $35 per month, the amount he paid in dues. (App. 50.) Joe McKilvie said he was against the union and that "we would work better without one." (App. 50.)[3]

On January 7, 1991, the new company received from the union a demand for recognition and bargaining.

[2] The Board refused to find that Mohr's observation regarding the service department employees' lack of union support created any doubt about the union's majority status.

[3] A number of other employees also made statements indicating that the union did not continue to enjoy majority support which the Board refused to count.

(App. 30.) On January 25, 1991, the company wrote back declining to enter into bargaining, "at least until further investigation," because it had a good faith doubt as to the union's continued majority support. The letter further stated that in order to ascertain the employees' views concerning the union, the company had arranged for an independent secret ballot poll to be taken on February 8, 1991. (App. 30.)

The company conducted a poll of the employees, supervised by a Roman Catholic priest. (App. 44, 58.) The results of the poll were 19 to 13, against the union. (App. 2, 44.) Based on the poll, the company withdrew recognition from the union after which the union filed unfair labor practice charges against the company. (App. 2, 43-44.)

The Board found that although the poll was conducted in a lawful manner,[4] the company was not entitled to conduct the poll in the first place because it did not have "a reasonable doubt, based on objective considerations, that the union continued to enjoy the support of a majority of the bargaining unit employees." (App. 25-26, 27.) Accordingly, the company was found to have violated Sections 8(a)(1) and (5) of the Act and was ordered to recognize and bargain with the union. (App. 26-27.) In making its decision, the Board engaged in a head count, counting an employee as no longer wanting union representation only if he made a statement that the Board accepted as unequivocal proof of opposition to the union.

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[4] The procedures for polling are set forth in *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967) and *Texas Petrochemicals*, 296 N.L.R.B. 1057 (1989), *enf'd in part*, 923 F.2d 398 (5th Cir. 1991).

That is the same test the Board uses to determine if an employer can lawfully withdraw recognition from a union. The Board did not consider the evidence cumulatively, nor did it inquire whether the evidence was sufficient to raise good faith doubt of union support, even if the evidence was not conclusive.

The Court of Appeals, in a 2-1 decision, enforced the Board's decision and declined to follow the decisions of three other Courts of Appeals which have rejected the Board's standard. *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295 (9th Cir. 1984); *Thomas Indus. Inc. v. NLRB*, 687 F.2d 863 (6th Cir. 1982); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981). Those courts allow polling to determine if a majority of employees continue to support the union if the evidence is sufficient to raise good faith *doubt* of the union's majority support, even if the evidence is not sufficient to justify withdrawal of recognition.

REASONS FOR GRANTING THE WRIT

I. THE BOARD'S STANDARD IS NOT ENTITLED TO DEFERENCE.

An incumbent union is presumed to represent employees of an asset purchaser, if a majority of the buyer's employees previously worked for the seller. *Auciello Iron Works, Inc. v. NLRB*, ___U.S.___, 116 S.Ct. 1754 (1996); *Fall River Finishing & Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). The new employer can overcome that presumption and withdraw recognition by showing (1) that the union did not in fact enjoy majority

support or (2) that the employer had a good faith doubt, based on a sufficient objective basis, of the union's majority support. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990). *See also Harley-Davidson Transportation Co.*, 273 N.L.R.B. 1531 (1985).

In *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974), the Board held that in order to poll employees as to their continued support for an incumbent union, an employer must have good faith doubt, based on objective considerations, as to the union's continuing majority status. That is the same test the Board also employs to determine whether there is sufficient evidence to withdraw recognition, or to process an employer-filed decertification (RM) petition. As this case illustrates, in applying that test, the Board focuses on the head count of employees who have made unequivocal statements proving that they no longer support the union. *See also Texas Petrochemicals*, 296 N.L.R.B. 1057 (1989) (divided Board panel reaffirming its standard), *enf'd in part*, 923 F.2d 398 (5th Cir. 1991).

The Board is, of course, entitled to deference as long as its rules are rational and consistent with the Act. *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 42. In this case, the Board's standard is neither.

As the dissent in the Court of Appeals pointed out, the most obvious problem with the Board's standard is the result it generated. Allentown Mack, a new employer that had never previously dealt with the union, undeniably had a legitimate interest in knowing if its employees supported the union. The law permitted the company to withdraw recognition if they did not. Allentown Mack

also had a reasonable basis, founded on objective evidence, for doubting whether a majority supported the union. The method used to ascertain whether those doubts were correct – the poll – was conducted in conformity with all Board-required safeguards to ensure against coercion. Nevertheless, as the dissenting Judge in this case observed, after a majority of employees voted against the union, the Board "not only adjudged that the employer committed the unfair labor practice by refusing to bargain with the union that commanded thirteen of thirty-two votes, but also placed the employer under a bargaining order amounting to a bar against de-certification of a union with only 40% support." (App. 14.)

At bottom, the sole explanation for the Board's holding is that it places a higher premium on protecting unions than on employee choice. Section 7, however, places the right to engage in collective bargaining and the right to refrain on an equal footing.[5]

The NLRB's fullest defense of its standard appears in *Texas Petrochemicals, supra*. There, the Board's main points were:

– *Since a poll and a decertification election are similar in purpose and effect, similar evidence should be required.* 296 N.L.R.B. at 1060-61. A poll and an employer-filed

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[5] In this regard, it bears mention that Section 7 only protects employee rights. Any rights a union enjoys under Section 7 are derivative. *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).

decertification (RM) election are similar in effect.[6] It is irrational, however, to apply the same standard to withdrawals of recognition. The Court of Appeals recognized the illogic of the Board's position, and suggested that it could be cured by raising the standard for withdrawals of recognition. However, the standard for withdrawals of recognition is already as high as it can be.[7]

– *Statutory purposes and goals require a high standard.* 296 N.L.R.B. at 1061-62. The Board wrote that "A principal purpose and ultimate goal of the Act is to promote industrial and workplace stability in collective bargaining relationships." *Id.* at 1061. It further asserted that permitting employer polls would "allow an employer's interest in testing its employees' support for a union to outweigh the statutory goal of stable collective bargaining relationships." *Id.* at 1062.[8]

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[6] The standard for RM elections is immune from judicial review. *American Federation of Labor v. NLRB*, 308 U.S. 401 (1940). There is a certain peremptory quality to the Board's argument that the courts should defer to its polling standard in order to maintain consistency with the Board's unreviewable policy in RM cases.

[7] That standard has been repeatedly enunciated by the Supreme Court. *Auciello Iron Works. v. NLRB, supra; NLRB v. Curtin Matheson, supra; Fall River Dyeing & Finishing, supra.*

[8] In *Auciello Iron Works*, the Court rejected the employer's attempt to champion its employees' rights. However, Allentown Mack has its own right not to bargain with a union that does not, in fact, represent a majority of its employees.

In this case, however, there was no established bargaining relationship. Rather, Allentown Mack was a successor employer. Solicitude for a union's interest in preserving its bargaining relationship during the transition from old to new employer entitles the union to a presumption of continued majority status. *Fall River Dyeing & Finishing*, 482 U.S. at 39-41. However, that solicitude is not unlimited – the presumption is rebuttable.[9] *Id.* As Justice Blackmun, author of the *Fall River Dyeing & Finishing* decision, pointed out in *Curtin Matheson*, the Board's standard makes it almost impossible for a new employer to amass the information necessary to make the rebuttal. As a practical matter, the rebuttable presumption becomes close to irrebuttable.

The reasonable doubt policy is not anomalous. 296 N.L.R.B. at 1063. The Board rejected the criticism that its policy was anomalous because it permitted polling only when it was of no value. The Board argued that some employers might wish to conduct a poll, even if they already had evidence sufficient to permit a withdrawal of recognition, in order to resolve the issue. "An employer may wish first to poll its employees to obtain more certain, precise information about the union's support than

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[9] In this case, the presumption of continued support rests on a weak factual foundation. Employees expressed rational reasons for preferring to give the new employer a chance to operate without a union. For example, employee Solt said he "doesn't want to pay $35 [per month] in union dues, he feels as though it is a complete waste of money." (App. 50.) Employees could sensibly take into account that they no longer worked for a huge multinational corporation, but for a small, locally owned and managed fledgling enterprise.

is provided by its own reasonable doubt." 296 N.L.R.B. at 1063. That, of course, is precisely what the company did in this case. The problem is that the Board makes it impossible to use polling exactly when "more certain, precise information" is most desirable, i.e., when there is substantial doubt, but not necessarily conclusive proof, of the union's loss of majority support.

II. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS ON THIS IMPORTANT ISSUE.

The Court of Appeals' decision creates a conflict among the circuits on an important issue, previously pointed out by the Chief Justice and Justice Blackmun in *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. at 797, 800 (Rehnquist, C.J. concurring; Blackmun, J. dissenting).

Three Courts of Appeals have rejected the Board's standard. All three found it unreasonable for the Board to permit polling only when there is no need for a poll. All three permit polling when the employer has "substantial, objective evidence of a loss of union support," even if the evidence would not be sufficient to prove actual loss of majority status. *Mingtree Restaurant, Inc. v. NLRB, supra; Thomas Indus. Inc. v. NLRB, supra; NLRB v. A.W. Thompson, Inc., supra.*

In *NLRB v. A.W. Thompson, supra,* the Court of Appeals for the Fifth Circuit held, "we are not convinced that an employer may conduct an employee poll only when it has no actual need to do so, that is, when it already has sufficient objective evidence to justify withdrawal of recognition." 651 F.2d at 1144 Observing that "the national labor policy favors employee free choice in

such matters," (*id.*) the court concluded that if the employer has not otherwise engaged in unfair labor practices or created a coercive atmosphere, it may, after giving notice to the union, "poll the employees for their union sentiment if there is other substantial, objective evidence of loss of union support (even if that evidence is not sufficient by itself to justify withdrawal) and the poll meets the procedural guidelines set out in *Struksnes.*" *Id.* at 1145.

In *Thomas Industries v. NLRB, supra,* the Court of Appeals for the Sixth Circuit adopted the *A.W. Thompson* polling standard. It rejected the Board's position that in order to conduct a poll, an employer must have objective evidence that over 50 percent of bargaining unit employees have rejected the union.

> We find the Board's position to be untenable. Under the Board's analysis, an employer would only be allowed to take a poll under circumstances where no poll was necessary; the only value of the poll would be to double check the employer's already sufficient evidence to refuse to bargain.

687 F.2d at 867.

The court further found that the evidence of loss of support should be considered cumulatively (rather than by the Board's head count method), and that the evidence in that case was sufficient to justify the poll. 687 F.2d at 868. The evidence presented included a sharp decline in dues check-offs, negative comments from one-third of the employees, and resignations of union officials.

In the most recent of the three cases, *Mingtree Restaurant, supra*, the Court of Appeals for the Ninth Circuit found,

> The Board has determined that the *Struksnes* procedures adequately protect employee interests in voting secrecy and assurance against employer reprisal in the organizational stage. Again, we see no reason why they would not afford as much protection after the union has been recognized.

736 F.2d at 1298.

The court also rejected the Board's argument that an employer-sponsored election usurps a Board function.

> In the organizational phase, however, the employer may choose between a private poll or a Board-supervised election. After recognition of the union, these options, as a practical matter, are foreclosed since neither employer-petitioned Board elections nor private employer polls will be allowed until the employer first produces other evidence sufficient to permit withdrawal of recognition.

Id. The court continued,

> We find it incongruous for the Board to grant the right to conduct polls of union sentiment during the crucial organizational period and effectively deny that right after the union has been recognized. While we appreciate the importance of maintaining stability in the bargaining relationship, we must also weigh the legitimate concern of the employer that it bargain only with the majority union. On balance, we find that polling that adheres to the *Struksnes* safeguards is an adjunct to, rather than a

> usurpation of, a Board function; it is an objective, minimally disruptive mechanism for obtaining evidence of the level of union support; and it enables the employer to avoid precipitous action, such as the withdrawal of recognition, when only less precise evidence is available.

736 F.2d at 1298.

The Court of Appeals for the Second Circuit also has expressed serious doubts about the Board's standards in this area. In *NLRB v. Albany Steel, Inc.*, 17 F.3d 564 (2d Cir. 1994), an employer withdrew recognition from a union based on substantial evidence casting doubt on the union's continued majority status. While agreeing with the Board that the employer's evidence of a loss of support was insufficient to permit a withdrawal of recognition, the court nonetheless held that the evidence created sufficient doubt to require that an election be held.

> The Board applies the same reasonable good faith doubt standard for ordering an election, for an employer's withdrawal of recognition, and for an employer's polling of employees . . . Although we are always reluctant to disagree with the Board in matters of labor policy, we find the Board's application of the same standard to each of these situations problematic.

Id. at 571. The court concluded that ordering an election was "preferable to enforcing a remedial bargaining order in the face of such doubt of the Union's majority status" (*id.* at 572) and, importantly, "would further the Act's policy of protecting employee free choice." *Id.* at 571.

The Chief Justice and former Justice Blackmun have previously taken note of the issue in this case and questioned the Board's standard. In *NLRB v. Curtin Matheson Scientific, supra,* the Chief Justice (concurring) observed,

> It appears that another of the Board's rules prevents the employer from polling employees unless it first establishes a good faith doubt of majority status. See *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1064 (1989) (the standard for employer polling is the same as the standard for withdrawal of recognition). I have considerable doubt whether the Board may insist that good faith doubt be determined only on the basis of sentiments of individual employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments. But that issue is not before us today.

494 U.S. at 797.

Justice Blackmun, dissenting,[10] wrote,

> I am also troubled by the fact, noted in the Chief Justice's concurring opinion, that while the Board appears to require that good faith doubt be established by express avowals of individual employees, other Board policies make it practically impossible to amass direct evidence of its workers' views.

494 U.S. at 800.

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[10] Justice Blackmun was the author of the Court's decision in *Fall River Dyeing & Finishing,* which contains a comprehensive review of labor law successorship doctrine.

Justice Blackmun continued,

> The NLRB has recently reaffirmed its rule that an employer must meet the same good-faith doubt standard in order to poll its employees, petition the Board for an election, or withdraw recognition from the union. *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1064 (1989). If good-faith doubt can be established only by the express statements of individual workers, the employer is placed in a difficult bind. *See Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (CA9 1984) ("By the Board's reasoning, an employer in doubt of the union's majority status would be allowed to take a poll only when it had no actual need to do so, that is, when it already had sufficient objective evidence to justify withdrawal of recognition").

494 U.S. at 800, n.3.

The District of Columbia Court of Appeals' decision in this case adopted the Board's standard, and rejected that of the courts. "As between the decisions of the three courts of appeals and the Board, we believe the Board has the better of it." 83 F.3d at 1487. It thus created a clear-cut conflict among the circuits, which should be addressed by the Supreme Court.

CONCLUSION

For these reasons, Allentown Mack respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,
EARLE K. SHAWE *
STEPHEN D. SHAWE
ERIC HEMMENDINGER
ELIZABETH TORPHY-DONZELLA
SHAWE & ROSENTHAL
Sun Life Building
20 S. Charles Street
Baltimore, MD 21201
(410) 752-1040

* *Counsel of Record*

November, 1996

APPENDIX A

ALLENTOWN MACK SALES AND SERVICE, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 95-1272.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 15, 1996.

Decided May 21, 1996.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Stephen D. Shawe, Baltimore, MD, argued the cause and filed the briefs for petitioner. Frances O. Taylor entered an appearance.

Linda Dreeben, Supervisory Attorney, National Labor Relations Board, Washington, DC, argued the cause for respondent. With her on the brief were Linda R. Sher, Associate General Counsel, and Aileen A. Armstrong, Deputy Associate General Counsel. Peter D. Winkler, Supervisory Attorney, National Labor Relations Board, entered an appearance.

Before: SENTELLE, RANDOLPH, and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

Dissenting opinion filed by Circuit Judge SENTELLE.

RANDOLPH, Circuit Judge:

Mack Trucks, Inc. sold its truck dealership and repair shop in Allentown, Pennsylvania, to a company formed by three of the dealership's managers. The new company – Allentown Mack Sales and Service, Inc. – took over on December 21, 1990.

For many years before the sale, a union represented the dealership's parts and service employees. Before the sale, the bargaining unit consisted of 45 employees: 32 service mechanics, 11 parts employees, a shop clerk and a janitor. After Allentown Mack bought the dealership, it reduced the number of mechanics to 23 and the number of parts employees to 7. Of the 32 employees hired by the new company, all had formerly worked for Mack Trucks.

In February 1991, after the union demanded recognition, the new company conducted a poll of its employees by secret ballot to test their support for the union. A Roman Catholic priest supervised the polling; he alone viewed the ballots and tallied the results. Nineteen employees voted against union representation; 13 voted in favor. Allentown Mack refused to recognize the union and the union filed unfair labor practice charges against the company with the National Labor Relations Board, which the Board sustained.

In this petition for review of the Board's decision, and the Board's cross-application for enforcement of its cease and desist order and its bargaining order, the pivotal issue is whether Allentown Mack violated §§ 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(5), by conducting the poll and

then refusing to recognize the union on the basis of the poll's results.

I

An incumbent union enjoys a rebuttable presumption that it retains the support of a majority of the employees in the bargaining unit. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37-41, 107 S.Ct. 2225, 2232-35, 96 L.Ed.2d 22 (1987). An employer may overcome the presumption through objective indications sufficient to raise a reasonable doubt about the union's majority status, in which event the employer has three options. *See id.* at 41 n. 8, 107 S.Ct. at 2235 n. 8; *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778, 110 S.Ct. 1542, 1544-45, 108 L.Ed.2d 801 (1990). The employer may simply withdraw recognition of the union; or it may seek a Board-conducted election – an "RM" election – pursuant to § 9(c)(1)(B), 29 U.S.C. § 159(c)(1)(B); or it may conduct a poll of employees, as Allentown Mack did here. *See Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1989 WL 224426 (1989), *remanded as modified*, 923 F.2d 398 (5th Cir.1991). An employer who withdraws recognition or conducts a poll without sufficient evidence of the union's loss of majority support commits an unfair labor practice.

Allentown Mack urges us to hold that the Board's standard for allowing polling – which is the same as that for withdrawing recognition and conducting an RM election – is too strict, that a lesser showing should suffice, and that if the lower standard had been applied in this case, the Board would have found the company's poll legal, and the results of the poll would then have justified

the company's refusal to bargain. We will get to Allentown Mack's evidence of lack of union support, evidence it says warranted the taking of the poll. First we must deal with the company's challenge to the Board's rule that an employer may poll only if it has objective indications raising a reasonable doubt about the union's majority status.

Three courts of appeals have rejected the Board's standard because, they believed, it rendered employer polls useless.[1] In light of the Board's approach, these courts wondered why an employer would ever need to conduct a poll. The only proper purpose of a poll, according to the Board, is to determine the truth of a union's claim of a majority. *See Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967). By using polls, employers can avoid making mistakes about the extent of employee support for the union. Yet the Board permits an employer to conduct a poll only when the employer already has "sufficient objective evidence to justify withdrawal of recognition from the union." *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir.1984). If polls are to be a "useful and legitimate tool" for employers with "sincere doubts" about the union's support,[2] the evidentiary standard for polling must be lower than the standard for withdrawing recognition. The Fifth, Sixth and Ninth Circuits therefore

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[1] *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141, 1144-45 (5th Cir.1981); *Thomas Indus., Inc. v. NLRB*, 687 F.2d 863, 867 (6th Cir.1982); *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297-99 (9th Cir.1984).

[2] *Thompson*, 651 F.2d at 1145; *Thomas Indus.*, 687 F.2d at 869; *Mingtree Restaurant*, 736 F.2d at 1299.

rejected the Board's standard and adopted their own, lower standard. Under the courts' standard, employers may conduct polls if they have "substantial, objective evidence of a loss of union support," as distinguished from a loss of the union's majority status.[3]

In the face of these decisions, the Board reconsidered its polling standard in *Texas Petrochemicals Corp.*, 296 N.L.R.B. at 1059-63, but decided to maintain it. The Board found it anomalous for the courts to allow an employer to conduct a poll – which has the same purpose as an RM election, but lacks the procedural protections – when the Board would refuse to conduct an RM election because the employer could not satisfy the evidentiary standard.[4] The Board said it favored elections over polling and

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[3] *Thompson*, 651 F.2d at 1145; *Thomas Indus.*, 687 F.2d at 869; *Mingtree Restaurant*, 736 F.2d at 1299.

[4] The Board put it this way:

> It would be anomalous to on one hand require an employer to show sufficient objective considerations on which to base a reasonable doubt about an incumbent union's majority support in order to have a formal, Board-conducted RM election for the purpose of determining the union's majority support, while on the other hand permitting that same employer to conduct an in-house, relatively informal poll for the same purpose, with the same serious potential consequences for the union and the employees, on the basis of a significantly less stringent evidentiary predicate, i.e., the courts' "loss of support" standard.

Texas Petrochemicals Corp., 296 N.L.R.B. at 1060.

described polling as "potentially disruptive and unsettling." *Id.* at 1061-62. Nevertheless, the Board acknowledged the "right" of an employer to take a poll "on the basis of reasonable doubt about a union's majority status." *Id.* at 1061. The Board thought that even then polling could still serve an important role. Although an employer meeting the Board's "reasonable doubt" standard could cease recognizing the union, "there still remains an inherent uncertainty about whether the union has actually lost its majority support. . . . Rather than simply withdraw recognition from a union that might still in fact have majority support, an employer might wish first to poll its employees to obtain more certain, precise information about the union's support than is provided by its own reasonable doubt. The employer can then act with confidence and certainty in light of the results of the poll." *Id.* at 1063. The Board concluded that allowing polling only in these limited circumstances achieves the best balance between the employer's interest in testing employee support for the incumbent union, and the statutory goal of stable collective-bargaining relationships. *Id.* at 1062.

Neither the courts' analysis nor the Board's response is entirely satisfactory. The courts' basic proposition – that the standard for polling should be lower than the standard for withdrawal of recognition – does not necessarily lead to the courts' conclusion that the Board's polling standard should be relaxed. The courts' objective could be accomplished by raising the Board's withdrawal-of-recognition standard. In deciding as they did, the courts have created the anomaly the Board identified, making it easier for an employer to conduct an unsupervised poll than to have a Board-supervised RM election.

Furthermore, we do not understand why the courts thought there was something wrong in the Board's having a standard that rendered polling only marginally useful to employers. Nothing in the National Labor Relations Act specifically governs this practice. Polling employees about their support for an incumbent union is, the Board believes, "potentially, if not inherently, both disruptive of the collective-bargaining relationship . . . and also unsettling to the employees involved." *Texas Petrochemicals*, 296 N.L.R.B. at 1061. In light of these dangers, the Board, in its expert judgment, reasonably limited the circumstances in which employers may conduct polls. *Thomas Indus., Inc. v. NLRB*, 687 F.2d 863, 866-67 (6th Cir.1982), and *Mingtree Restaurant*, 736 F.2d at 1298, tout polling as a means by which employers may avoid the risk of bargaining with a minority union, itself a violation of § 8(a)(2). But the risk is nonexistent. The employer is protected by the presumption of the union's continuing majority status. *See* Joan Flynn, *A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union*, 1991 WIS.L.REV. 653, 665, 667-70.

As to the Board's reasoning in *Texas Petrochemicals*, it seems to us inconsistent for the Board to say that RM elections are the preferred method for testing employee support of the union, 296 N.L.R.B. at 1061, and yet maintain the same evidentiary standard for allowing polling. The Board's statements about RM elections "lead squarely to the conclusion that the polling standard should be *more* stringent than that for RM elections." 1991 WIS.L.REV. at 660. But suppose the Board is correct that because polling and RM elections enable employers to test union support, the same evidentiary standard should

apply. How then can the Board justify applying the identical standard to an employer's decision to withdraw recognition, a decision lacking any procedural safeguards? The Board's analysis, it seems, should have led it to impose a more stringent evidentiary standard on employers who withdraw recognition without having the results of a poll or an RM election. *Id.*

As between the decisions of the three courts of appeals and the Board, we believe the Board has the better of it, and not simply because it is the agency charged with administering the National Labor Relations Act. The only issue here relates to polling. It may be that the Board should set a higher standard for withdrawals of recognition and a lower standard for RM elections, but those questions are not before us and, at any rate, we could not answer them without first choosing a baseline from which to measure "higher" and "lower." Nothing we have seen justifies our disregarding the Board's choice and replacing it with a judicially-created lower standard for polling. The Board's system has its faults, but so does the one created by the courts. In this situation, the only proper course is for us to defer to the Board. *Fall River*, 482 U.S. at 42, 107 S.Ct. at 2235; *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01, 98 S.Ct. 2463, 2473-74, 57 L.Ed.2d 370 (1978). The Board, not the courts, has "the primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. at 786, 110 S.Ct. at 1549.

II

Applying its evidentiary standard for polling, the Board found that Allentown Mack had not satisfied it. According to the Board, only 7 of the 32 employees in the bargaining unit made statements repudiating the union, far short of the number needed to raise doubts about the union's majority support. Allentown Mack challenges this conclusion on the ground that the Board should have counted several other employees among the group not favoring the union.

Of the employees the Board refused to count, three – Pete McArthur, Dennis Wehr, and Randy Zoltack – were not members of the bargaining unit on January 25, 1991. That is the date of Allentown Mack's letter to the union refusing recognition and announcing the poll. We see no basis for disagreeing with the Board's use of January 25 as the date for assessing the company's compliance with the polling standard. The letter was the company's first communication with the union after the union's demand for recognition on January 2. By the date of the letter, Allentown Mack had already decided to take the poll. It follows that the views of employees who were hired after January 25 could not support the company's decision. And the Board had sufficient reason not to count employees who were, by that date, no longer working for the company. The question, as the Board framed it, was whether on January 25 Allentown Mack reasonably doubted whether a majority of the employees then working supported the union.

The Board discounted the statements of two other employees – Mike Ridgick and Dennis Marsh. After being

told during a job interview that the new company would be non-union, Ridgick said that "as long as the new company would treat them right, there was no need for a union." Allentown Mack thinks it significant that in 1986 Ridgick had asked a manager about decertifying the union, but the ALJ found the 1986 statement too remote to be probative of Ridgick's union sympathies in 1991. The ALJ also found Ridgick's statement during the interview "at best equivocal." Why, the ALJ asked, would Ridgick have expressed any prounion sentiment during a job interview, especially after having been told that the new company would be non-union? As to Marsh, he said during his job interview that he was paying $35 a month in union dues and not getting his money's worth. The ALJ found that Marsh's expression of dissatisfaction with the union did not mean he wanted the union to stop representing him and the other employees.

The Board had good reason to agree with the ALJ about both of these employees. Board precedent holds that an employer may not rely on an employee's anti-union sentiments, expressed during a job interview in which the employer has indicated that there will be no union. Such employee expressions are unlikely to be sincere. *Middleboro Fire Apparatus, Inc.*, 234 N.L.R.B. 888, 894, 1978 WL 7283, *enforced*, 590 F.2d 4, 9 (5th Cir.1978). Board precedent also holds that an employee's statements of dissatisfaction with the quality of union representation may not be treated as opposition to union representation. *Destileria Serralles, Inc.*, 289 N.L.R.B. 51, 1988 WL 214114 (1988), *enforced*, 882 F.2d 19 (1st Cir.1989); *Wagon Wheel Bowl, Inc. v. NLRB*, 47 F.3d 332, 335-36 (9th Cir.1995).

Allentown Mack also invoked the statements of two employees – Kermit Bloch and Ron Mohr – as evidence of the views of other workers in the unit. Bloch told a manager that the entire night shift, consisting of five or six employees, did not want the union. The ALJ refused to credit this because Bloch did not testify and thus did not explain how he formed his opinion. Also, there was no evidence that any of the night shift employees made independent representations to the company about their union sympathies, and none of those employees testified at the hearing. Mohr, who was the union steward for the service department, told a manager that if a vote was taken, the union would lose and that he did not think the employees wanted a union. The ALJ rejected Mohr's statement, calling it an "almost off-the-cuff" remark and an "unverified assertion." Mohr did not testify about how he formed his opinion or about which employees – only those in the service department or all employees in the unit – he had in mind. Allentown Mack is not correct that the Board, in adopting the ALJ's findings, contradicted its precedent and ours. The Board has consistently questioned the reliability of reports by one employee of the antipathy of other employees toward their union. *See Westbrook Bowl*, 293 N.L.R.B. 1000, 1001 n. 11, 1989 WL 223989 (1989); *Louisiana-Pacific Corp.*, 283 N.L.R.B. 1079, 1080 n. 6, 1987 WL 89647 (1987); *Sofco, Inc.*, 268 N.L.R.B. 159, 160 n. 10, 1983 WL 24722 (1983); *Bryan Mem. Hosp. v. NLRB*, 814 F.2d 1259, 1262 (8th Cir.), *cert. denied*, 484 U.S. 849, 108 S.Ct. 147, 98 L.Ed.2d 103 (1987); *NLRB v. Cornell of California, Inc.*, 577 F.2d 513, 516 (9th Cir.1978). The two cases Allentown Mack cites – *Naylor, Type & Mats*, 233 N.L.R.B. 105, 1977 WL 9263 (1977), and *American Mirror*

Co., 277 N.L.R.B. 1626, 1986 WL 53709 (1986) – are distinguishable. In both, the information the employer received about other employees was, unlike the information the company relied on here, specific and detailed. As to shop steward Mohr, it is true that the Board and this court have held that a company may sometimes rely on a union official's admission that the union lacks majority support. *See Universal Life Insurance*, 169 N.L.R.B. 1118, 1119 (1968); *Lodges 1746 & 743, Int'l Ass'n of Mach. & Aero. Workers v. NLRB*, 416 F.2d 809, 812-13 (D.C.Cir.1969), *cert. denied*, 396 U.S. 1058, 90 S.Ct. 751, 24 L.Ed.2d 752 (1970). But, for the reasons given by the ALJ, Mohr's statement did not have sufficient indicia of reliability to justify the company's treating it as a reflection of the views of a majority of the workers in the unit.

We therefore sustain the Board's decision, as supported by substantial evidence, that only 7 of the 32 employees had repudiated the union and that Allentown Mack did not have a reasonable doubt about the union's continuing majority status.

III

As part of its remedy, the Board ordered Allentown Mack to bargain with the union, and barred it from challenging the union's majority status for a reasonable period of time. The company objects to this portion of the order on the grounds that the Board did not explain why the bargaining order was necessary and did not weigh the need for union protection against the competing interest of employee choice. *See Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C.Cir.1994); *Charlotte Amphitheater*

Corp. v. NLRB, 82 F.3d 1074, 1077-78 (D.C.Cir.1996). But Allentown Mack never raised this objection before the Board and it presented no evidence regarding the propriety of a bargaining order. The Board does not have an "affirmative duty" to consider the sort of challenge the company makes here. *Charlotte Amphitheater*, 82 F.3d at 1079. "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). There were no "extraordinary circumstances." Allentown Mack has no excuse. The ALJ's decision recommending a bargaining order gave the company fair warning that one might be in the offing. And after the Board ruled, the company could have, but did not, move for reconsideration. *See Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 49-50 (D.C.Cir.1990).

Petition for review denied, cross-petition for enforcement granted.

SENTELLE, Circuit Judge, dissenting:

At the outset of this dissent, a brief review of the underlying facts and the result reached by the Board and the majority is in order. Allentown Mack, a new company, undertook operations by hiring thirty-two of the forty-five employees of a predecessor company. The bargaining unit in the predecessor company had been represented by a union. The union demanded recognition. Seven of the thirty-two bargaining unit employees made unequivocal statements that they did not desire to be any longer represented by the union. Another employee, not counted among the seven, asked a management employee about

de-certifying the union. Another employee, indeed a union steward, told the branch manager that the employees did not need a union. Still another employee in his employment interview stated that he was not being represented for the $35.00 he was paying. One of the seven who made the statements of wishing not to be unionized, also stated that "the entire night shift did not want the union." Another employee, the shop steward in the largest of the two departments in the bargaining unit, told the manager that "with a new company, if a vote was taken, the union would lose and that it was his feeling that the employees did not want a union."

Based on these expressions of union disinterest from the employees, the company management conducted a poll supervised by a Roman Catholic priest. There is no finding by the Administrative Law Judge ("ALJ") or the Board that the company conducted the poll in any unfair or improper manner whatsoever. In the poll, the employees rejected the union by a margin of 19-to-13. The ALJ found, the Board concluded, and the majority today affirms that "the respondent lacked a reasonable doubt of the union's continued majority status. . . . " *Allentown Mack Sales*, 316 N.L.R.B. 1199, 1200, 1995 WL 221136 (1995). Based on that conclusion the Board not only adjudged that the employer committed the unfair labor practice by refusing to bargain with the union that commanded thirteen of thirty-two votes, but also placed the employer under a bargaining order amounting to a bar against de-certification of a union with only 40% support.

I do not suggest that our decisions should be result-driven. I do not even suggest that in every instance in which an administrative agency's application of the law

yields a bizarre result a petition for review should be allowed; but when such a result does occur, that application of the law should be closely scrutinized, particularly when other courts have avoided that result. When the law becomes divorced from logic and from the common sense of the people who live under it, then the Dickens character Mr. Bumble who declared that "the law is a ass" becomes most believable.[1] The Board's rule, establishing that an employer cannot conduct a poll to determine majority support unless it already has so much evidence of no majority support as to render the poll meaningless, is just such an application. The three other circuits who have examined this question have unanimously concluded that the Board's rule cannot stand.

A Fifth Circuit decision in *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir.1981), began with the indisputable proposition that under the NLRA an employer must bargain with a union which represents the majority of the employees but must not bargain with the union that does not have majority support, and that a violation of either of these duties is an unfair labor practice under § 8(a)(1). The court further noted that the NLRB had recognized in *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967), that a union support poll is a "valid and helpful" device for the

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[1] CHARLES DICKENS, OLIVER TWIST 399 (New Oxford Illustrated Dickens ed., Oxford University Press 1966) (1838).

testing of union sentiment.[2] Reasoning from these underlying principles, the *Thompson* court expressly held that:

> when an employer "has not engaged in unfair labor practices or otherwise created a coercive atmosphere," it may, after giving notice to the union, poll the employees for their union sentiment if there is other substantial, objective evidence of a loss of union support (even if that evidence is not sufficient by itself to justify withdrawal) and if the poll meets the procedural guidelines set out in *Struksnes*.

A.W. Thompson, Inc., 651 F.2d at 1145 (quoting *Struksnes*, 165 N.L.R.B. at 1063).

In *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295 (9th Cir.1984), the Ninth Circuit faced the same question and reached the same conclusion. Like the Fifth Circuit, the Ninth held that polling is a "useful and legitimate tool for the employer who is in sincere doubt of the union's majority status," and "therefore h[e]ld . . . that as long as the employer complies with the *Struksnes* conditions and procedural safeguards, it may poll its employees to determine their union sentiment if it has substantial, objective evidence of a loss of union support, even if that evidence is insufficient by itself to justify withdrawal of recognition. . . . " *Id.* at 1299.

The Sixth Circuit, in *Thomas Industries, Inc. v. NLRB*, 687 F.2d 863 (6th Cir.1982), discussed the question with

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[2] Concededly, the *Struksnes* opinion was not genuinely on point either in *Thompson* or in the instant case as it dealt with initial certification rather than de-certification holding, but that would not seem to affect pertinent reasoning.

reasoning particularly helpful in the instant case. That Circuit noted the dilemma of the employer who would commit an unfair labor practice if it refused to bargain with a union having majority support or did bargain with a union which did not enjoy that support. The Circuit further noted that a union enjoying certified majority support was entitled to a presumption of continuing support, but that the presumption became rebuttable after one year and that the year had passed in the *Thomas* case well before the poll was taken. *Id.* at 867. As did the Fifth and Ninth Circuits, the Sixth Circuit held "that an employer may poll its employees to determine their union sentiment if it has substantial, objective evidence of a loss of union support, even if that evidence is insufficient in itself to justify withdrawal." *Id.*

In the *Thomas Industries* case, an ALJ had found that approximately one-fourth of the employees had made negative statements concerning representation. On that and other evidence, he found that the company had no objective basis to doubt the majority support for the union and held the polling to be a § 8(a)(1) violation. *Id.* The Board concurred. The court reversed, holding: "We find no substantial evidence to support the Board's conclusion that the Company did not have a good faith doubt as to the Union's majority status." *Id.* at 868. Just so in the present case.

Indeed, the present case is, if anything, a stronger one for rejecting the Board's approach than was *Thomas*. The *Thomas* court noted that the presumption of continuing majority status "was rebuttable since more than one year had passed" since the certification. *Id.* at 867. The emerging bargaining unit at Allentown Mack had never

been literally sampled for majority support. Its thirty-two employees were drawn from a larger unit previously represented, and it is of course the law that a successor employer inherits the bargaining obligation of its predecessor. *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 36-41, 107 S.Ct. 2225, 2232-35, 96 L.Ed.2d 22 (1987). Nonetheless, the factual underpinnings for the presumption of continuing status obviously are weaker when a unit contains less than all of the previously certified employee group.[3] As in the *Thomas Industries* case, the ALJ and the Board affirming the ALJ offer nothing of record to support their conclusion that the polling employer lacked a good faith doubt as to the union's majority status. I find it arbitrary and capricious of the Board to find that the employer committed unfair labor practices in the face of overwhelming unrefuted evidence that the union lacked majority support, including a poll taken with the utmost in safeguards for fairness and objectivity.

As there is no suggestion of unfairness in this case and there is overwhelming objective evidence of the loss of majority support, I would hold that the Board reached the wrong conclusion.

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[3] By way of example, if the 45 employees in the prior unit had been split at 23-to-22 in achieving the prior majority, without any change of sentiment on the part of any employee, the majority status would cease to exist if the 13 no longer employed unit members were split 8-to-5 in favor of the union, an event not statistically unlikely.

APPENDIX B

Allentown Mack Sales & Service, Inc. *and* Local Lodge #724, International Association of Machinists and Aerospace Workers, AFL-CIO.
Case 4-CA-19516

April 12, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND
MEMBERS STEPHENS AND TRUESDALE

On January 24, 1992, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed cross-exceptions, supporting briefs, and answering briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified herein and to adopt the recommended Order.

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[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In adopting the judge's credibility determinations, we do not rely on the adverse inference he drew from the General Counsel's failure to recall Ron Mohr as a rebuttal witness.

The judge found that the Respondent is the successor to Mack Trucks, Inc. (Mack) and that it had not demonstrated that it harbored a reasonable doubt, based on objective considerations, as to the incumbent Union's continued majority status after the transition. He therefore found that the Respondent violated Section 8(a)(5) and (1) by conducting a poll of the unit employees to determine their desires for continued union representation, and by declining to extend recognition to the Union on the basis of the results of the poll, which the Union lost. The judge did not, however, find that the Respondent unlawfully refused to bargain with the Union prior to the poll.

The Respondent has excepted to the judge's finding that it lacked a reasonable doubt that the Union continued to enjoy majority support, and to all the violations he found. The General Counsel and the Union have excepted to the judge's failure to find that the Respondent's refusal to bargain prior to the poll violated Section 8(a)(5) and (1), and to his failure to find that the poll constituted an independent violation of Section 8(a)(1).

We adopt the judge's findings that the Respondent is Mack's successor[2] and that it had hired a substantial and representative complement of employees at the time it is alleged to have violated the Act.[3] We also adopt his

[2] We therefore find it unnecessary to pass on the General Counsel's exception to the judge's finding that Mack, rather than the Respondent, advertised truck modification services.

[3] The judge, however, indicated that the employees hired were a representative complement of the former bargaining unit, because nearly all of the Respondent's service and parts employees were former bargaining unit members. In so doing, the judge inadvertently commingled two separate concepts; there is no such thing as a "representative complement of the former bargaining unit." "Substantial and representative complement" refers to the successor employer's level of employment and operations, not to the number of employees formerly employed by the predecessor. The Board finds that a bargaining obligation attaches when the successor has hired a substantial and representative complement of employees *and* a majority of those employees had been employed by the predecessor. See discussion in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 46-52 (1987). That was the case here in January 1991.

finding that the Respondent has not demonstrated that it held a reasonable doubt, based on objective considerations, that the Union continued to enjoy the support of a majority of the bargaining unit employees.[4] In this regard, we agree with the judge that the Union did not waive its right to represent the employees by entering into an agreement with Mack which provided in part that "[t]he current Agreement between the parties will be rendered null and void as of the close of business on

[4] We therefore find it unnecessary to pass on the General Counsel's and the Union's exceptions to the judge's findings that the Respondent could properly rely on statements by Jon McKilvie and Scott Murphy to support a reasonable doubt as to the Union's continued majority status.

In discounting statements made in employment interviews by Ronald Mohr and Mike Ridgick because those applicants had been told in their interviews that the new company would be nonunion, the judge cited *Phoenix Pipe & Tube Co.*, 302 NLRB 122 fn. 2 (1991), enfd. 955 F.2d 852 (3d Cir. 1991). Although the cited reference was to then Chairman Stephens' personal footnote, and not to the decision of the Board, the judge's finding was consistent with Board precedent. See *Middleboro Fire Apparatus*, 234 NLRB 888, 894 (1978), enfd. 590 F.2d 4 (1st Cir. 1978).

December 20, 1990.[5] Any and all grievances filed or to be filed are to be considered settled as of this date." We find no merit to the Respondent's argument that, because the only evidence of Mack's recognition of the Union is the contractual recognition clause, the Union waived its right to recognition by signing the above agreement. The waiver of a statutory right must be clear and unmistakable and will not be inferred merely from a general contractual provision.[6] The general statement that the contract will become null and void as of the time the Respondent took over operations from Mack contains no clear and unmistakable indication that the parties intended to put an end to the Union's representative status. Accordingly, the judge properly found that the Respondent could not legitimately rely on the Union's agreement with Mack as a basis for forming a reasonable doubt that the Union still represented a majority of the unit employees.

The Respondent contends that the judge erred in finding that the Respondent could not legitimately rely on a statement by Ronald Mohr, the Union's service department steward, as a basis for doubting the Union's majority status. According to the credited testimony of the Respondent's president, Robert Dwyer, Mohr told Dwyer before the transition that "with a new company that if we took a vote that the union would lose, and that it was his feeling that the guys didn't want a union." The

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[5] Mack operated the Allentown facility until December 20, 1990. The Respondent began operating the facility on December 21.

[6] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

Respondent argues that that statement, made by a "Union official," was probative of a loss by majority on the part of the Union.

The judge, however, found (among other things) that Mohr made that statement in December 1990, before the Respondent's supervisors began to interview Mack's employees for possible employment in the new company. The Respondent hired only 23 of Mack's 32 service employees and only 7 of its 11 parts employees, as well as a janitor and a computer operator who had been in the Mack bargaining unit. The judge found that when Mohr made his remark to Dwyer, he was referring to Mack's existing employee complement, not to the individuals who were later hired by the Respondent, and reasoned that "Certainly the composition of the complement of employees hired would bear on whether this group did or did not support the Union." He further found that Mohr was not in a position to speak for the parts employees. The Respondent, in exceptions, contests the judge's finding that Mohr was referring to Mack's employee complement, not the Respondent's, and argues that Mohr's comments should be given more weight than equivalent remarks of a rank-and-file employee because he was a union steward.

We find no merit to those contentions. Although the record does not clearly establish exactly when Mohr made his statement to Dwyer, Dwyer was asked to describe all statements made by employees *before the December interviews* that indicated a loss of employee support for the Union. Mohr's was one of the statements recounted by Dwyer, with no indication that the timeframe had changed. Accordingly, we find that the

record supports the judge's finding that Mohr made his remark before the interviews had been conducted, and thus that the judge was warranted in inferring that Mohr must have been referring to Mack's employee complement, not the Respondent's.[7] We also agree with the judge that, as steward for the service department, Mohr had no more basis than any other employee for reporting the union sentiments of employees in the parts department. For the above reasons, as well as the others discussed by the judge, we adopt the judge's finding that the Respondent could not rely on Mohr's statement as a basis for doubting the Union's majority status.[8]

[7] In any event, the Respondent bears the burden of establishing that it reasonably doubted the Union's majority status. See, e.g., *Laidlaw Waste Systems*, 307 NLRB 1211 (1992). The Respondent has not met its burden of showing that Mohr made his statement after the interviews. Dwyer could not remember the actual date in December on which he talked to Mohr; he testified that it was "approximately the 15th or so." Mohr testified that the conversation took place in December, before the Respondent took over the facility; he did not say whether it was before or after the interviews. The Respondent therefore has not demonstrated that Mohr was referring to the Respondent's employee complement when he said that the Union would lose a vote of the employees. In this regard, this case is distinguishable from *J & J Drainage Products*, 269 NLRB 1163 (1984), in which the Board relied on a steward's statement, made after the successor employer took over the facility, that the employees did not want a union.

[8] The Respondent relies on several decisions which, it alleges, require the opposite result. We disagree. As is evident from the Respondent's brief, those cases are factually distinguishable from this one in numerous respects. In particular, *Universal Life Insurance Co.*, 169 NLRB 1118 (1968); *Machinists Lodges 1746 & 743 v. NLRB*, 416 F.2d 809 (D.C. Cir. 1969); and *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720 (5th Cir. 1978), all involved statements by union bargaining representatives or attorneys concerning loss of support. Those individuals evidently were in a better position to know the sentiments of employees overall than was Mohr, who as a steward represented only the service employees. They were also more obviously speaking for their respective unions than was Mohr, and therefore the employers were more justified in relying on their remarks as admissions on the part of the unions than the Respondent was in relying on Mohr's statement. In *Naylor, Type & Mats*, 233 NLRB 105 (1977), the administrative law judge accepted an employee's statement that he was personally unhappy with the union and that "people in the front and back" did not recognize the union as evidence that the union lacked majority support; however, the judge evidently considered that statement only as indicating that the speaker opposed the union, not that others did. The judge also held that the employer could rely on remarks by two employees that they had actually taken head counts and enumerated the employees who supported and who opposed the union. The Respondent relies on no such testimony. Finally, to the extent the court decisions are inconsistent with Board law, we respectfully decline to follow them.

We agree with the General Counsel and the Union that the judge erred in finding that the Respondent did not unlawfully refuse to bargain by informing the Union in its January 25 letter that it would not recognize and bargain with the Union until it received the results of its February 8 poll of the unit employees. (The judged reasoned that the Respondent "merely postpone[d] that decision until the results of the employee poll [were] known.") As the judge properly found, however, the Respondent lacked a reasonable doubt of the Union's continued majority status and therefore was not entitled

to take the poll at all.[9] Thus, it had no "decision" to make, let alone postpone. Its duty was to bargain, not to wait for the outcome of an unlawful poll before it made up its mind to comply with its statutory obligations. An employer may not delay bargaining while it awaits the outcome of an event it may not insist on taking place to begin with.[10] Consequently, the Respondent violated Section 8(a)(5) and (1) by refusing to bargain pending the outcome of the poll.

We adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union on the basis of the results of

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[9] *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1058-1063 (1989). We agree with the judge that the showing made by the Respondent (6 or 7 employees opposed to the Union out of a bargaining unit of 32) would be insufficient to meet even the more lenient standard for polling endorsed by several courts of appeals. See Member (then Chairman) Stephens' concurring opinion in *Texas Petrochemicals*, supra at 1065-1066. Member Stephens would affirm the judge's finding on this point for the reasons discussed in that concurrence.

The judge found that the Respondent violated Sec. 8(a)(5) and (1) by taking the poll. As the complaint does not allege an 8(a)(5) violation in this regard, we find only that the poll violated Sec. 8(a)(1). Because we find that the Respondent was not entitled to conduct the poll, we find it unnecessary to decide whether the judge correctly found that the Respondent provided the Union sufficient advance notice of the poll under *Texas Petrochemicals*, supra.

[10] *See, e.g., Lee Lumber & Building Material Corp.*, 306 NLRB 408, 410, 419-420 (1992) (employer violated Sec. 8(a)(5) by delaying bargaining for several weeks on the basis of a pending decertification petition, contrary to *Dresser Industries*, 264 NLRB 1088 (1982)).

the poll. We agree with the judge that, because the poll itself was an unfair labor practice, the Respondent could not lawfully rely on the results of the poll in declining to recognize the Union.[11]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Allentown Mack Sales and Service, Inc., Allentown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.[12]

Richard Heller, Esq., for General Counsel.

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[11] *Texas Petrochemicals*, supra at 1064. As the Respondent was not entitled to rely on the results of the tainted poll in refusing to recognize and bargain with the Union after February 8, neither could it rely on those results to validate its earlier unlawful refusal to bargain. Thus, there is no merit to the Respondent's argument that the poll was lawfully taken in preparation for its defense to the pending unfair labor practice charge, because the results of the poll could not have been used in that defense. Cf. *NLRB v. Johnnie's Poultry Co.*, 344 F.2d 617 (8th Cir. 1965)

[12] To remedy the Respondent's unlawful refusal to recognize and bargain with the Union, the judge imposed an affirmative bargaining order. In exceptions, the Respondent argues only that it did not violate the Act, not that a bargaining order is an inappropriate remedy for an unlawful refusal to recognize and bargain with an incumbent union. In any event, an affirmative bargaining order is the standard Board remedy for such a violation. See *Williams Enterprises*, 312 NLRB 937, 940 (1993). We find, for the reasons discussed in that decision, that the judge imposed the appropriate remedy here.

George S. Flint, Esq., of New York, New York, for the Respondent.

Dennis P. Walsh, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

Statement of the Case

Wallace H. Nations, Administrative Law Judge. Local Lodge #724, International Association of Machinists and Aerospace Workers, AFL – CIO (the Union) filed a charge on January 22, 1991, against Allentown Mack Sales & Service, Inc. (Respondent). The Union filed an amended charge on February 14, 1991. Based upon these charges, the Regional Director for Region 4 issued complaint and notice of hearing on March 27, 1991, alleging, inter alia, that Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) of the National Labor Relations Act. Respondent filed timely answer admitting certain of the complaint allegations, including jurisdiction and labor organization status of the Union, but denying that it has committed any unfair labor practice.

Hearing was held in these matters on October 15 and 16, 1991, in Philadelphia, Pennsylvania. Briefs were received from all parties on or about December 16, 1991. Based upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

Findings of Fact

I. JURISDICTION

Respondent, a corporation, engages in the retail sale and repair of new and used trucks and parts at its facility located in Allentown, Pennsylvania. It is admitted and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It was admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts and the Issues for Determination*

The Respondent sells and repairs new and used trucks and sells truck parts at a single facility in Allentown, Pennsylvania. The facility was owned and operated by Mack Trucks, Inc. (Mack) as a factory branch until December 20, 1990.[1] The Union represented a unit of Mack Truck's service and parts employees at this facility, and its final collective-bargaining agreement with Mack

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[1] All dates are in 1990 unless otherwise noted.

Trucks was effective by its terms from September 15, 1989, through September 15, 1992.[2]

By memorandum of understanding dated December 5, the Respondent and Dwyer Holdings, Inc. purchased certain assets of Mack at or relating to the Allentown facility. The Respondent commenced operating on December 21.

By letter dated January 2, 1991, and received by Respondent on January 7, the Union requested recognition and bargaining over a collective-bargaining agreement with respect to unit employees. On January 25, 1991, the Respondent, by letter, declined to extend recognition until further investigation, citing a good-faith doubt as to the Union's majority status among unit employees. Pursuant to notice given in this letter, the Respondent held a poll of its employees on February 8, 1991, wherein the majority of employees voting indicated they did not want to be represented by the Union.

By letter dated February 12, 1991, the Union rejected the results of the poll. There has been no further communication between the parties, except through the filing of charges with the Board.

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[2] The recognized appropriate unit of employees is as follows:

> All shop employees, shop clerk and partsmen who perform work of the classifications outlines in Article XII of the Collective-Bargaining Agreement. Excluded shall be all office clericals, watchmen, drivers, salesmen, foremen and other supervisors as defined in the Labor Management Relations Act of 1947.

Given these background facts, the complaint alleges the following facts which give rise to the allegations of violation of Section 8(a)(1) and (5) of the Act:

1. On or about February 8, 1991, the Respondent, acting through Robert J. Dwyer, at the Allentown facility, interrogated its employees regarding their union membership and sympathies.

2. On or about January 2, 1991, the Union, by letter from Michael J. Walsh, business representative, to Robert J. Dwyer, requested the Respondent to recognize it, and to bargain collectively with it, as the exclusive representative of the unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

3. Since on or about January 7, 1991, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive representative of the unit.[3]

General Counsel asserts that Respondent is a successor to Mack with respect to its obligation to recognize and bargain with the Union as representative of the employees in the unit. He also asserts that the Respondent unlawfully interrogated its employees in the unit and that the Respondent cannot lawfully rely on the results of a poll to refuse to recognize the Union. Respondent asserts that it is not a successor, that it had a good-faith doubt with respect to the Union's majority status

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[3] The complaint alleged January 25, 1991 as the date Respondent refused to recognize the Union. General Counsel amended the complaint at the hearing to allege the earlier date.

among its unit employees, and that in fact, the Union did not enjoy majority status.

B. *Was the Respondent a Successor Employer and was the Union Entitled to a Presumption of Majority Status Among the Affected Employees of Respondent?*

As noted above, Mack Trucks, Inc. operated the involved facility as a factory branch until it sold the facility to Respondent and designated Respondent as an independent dealership on December 20, 1990. Since 1973, Mack had recognized the Union as the exclusive representative of a unit of its employees, primarily service department mechanics and parts department employees. Successive collective-bargaining agreements had been entered into between Mack and the Union covering these employees, the last such agreement being executed in 1989 and set by its terms to expire in 1992.[4]

In 1990, the Mack branch was managed by Robert Dwyer, and had as its business manager, Richard Welch; its service manager, David Worth; and a parts manager whose name I do not find in the record. Service department foremen were Roy Christ and David Grimm. Dwyer learned in mid-May that the branch facility was going to be sold and in June learned what the asking price would be. In August, he and a group of investors, including

[4] Respondent asserts that General Counsel failed to establish the manner in which the Union became recognized as the representative of the involved unit of Mack employees. Whether the Union was certified by the Board or voluntarily recognized by Mack, it still is entitled to the presumption of continued majority status and to be recognized by a successor.

Worth and Welch, made an offer to Mack to purchase the facility and operate it as an independent distributorship. Dwyer was subsequently notified that his group was the successful bidder and the parties entered into negotiations to effect the purchase. This resulted in a memorandum of understanding dated December 5, as well as a separate real estate agreement and lease. Mack retains no ownership interest in Respondent and did not provide any financing for the purchase.

In July, Mack sent a letter to the Union which reads:

> I regret to inform you that on September 14, 1990, Mack Trucks, Inc. will consummate the sale of its branch facility located on Route 309 in Allentown, Pennsylvania. This will result in permanent loss of employment beginning on September 13, 1990 for all the individuals in the bargaining unit represented by your local at that location. This notice is provided herewith is intended to satisfy the Federal WARN Act (Public Law 100-379).

Mack and the Union held two bargaining sessions over the effects of the sale of the facility on the bargaining unit. The first of these sessions took place on November 15. Representing Mack at this meeting were Tom Thomasik, Mack's labor representative, and the branch facility manager, Dwyer. For the Union were Union Representatives Michael Walsh and James Walsh and employees Ron Mohr, Dennis Ware, and Larry Frantz. According to Michael Walsh, the meeting opened with a discussion of the date of the closing of the branch and who would be hired after closing. Thomasik said the facility would undergo a transfer of ownership and

would reopen as an independent dealership, with Dwyer as owner. James Walsh asked if the Union would represent employees under the new ownership and would Dwyer bargain with the Union. Dwyer did not respond, and Thomasik said that he was meeting only to discuss effects bargaining. Dwyer did not remember being identified as the purchaser at this meeting or any question being directed to him with respect to future recognition of the Union. I credit Dwyer's testimony in this regard as the transaction between his group and Mack was not completed until December 5, a date subsequent to this meeting.

A second meeting between the same parties occurred on December 6. At this meeting, the Union presented a proposal for the close down, continuation of health and welfare benefits, and severance pay. It asked Thomasik for a copy of the sales agreement for the transfer of the facility. At this second session, it was known that Dwyer was going to be a principal in the purchaser and the Union asked him to recognize the Union. Thomasik cut the conversation off by saying the meeting was for effects bargaining only and it was not the proper forum to raise this issue. According to Dwyer, one of the Walshs' responded, "We can do it the easy way, or we can do it the hard way." Dwyer did not comment.

As a result of the meeting, the Union and Mack reached an agreement with respect to the change in ownership which provides:

> 1. The current Agreement between the parties will be rendered null and void as of the close of business on December 20, 1990. Any

> and all grievances filed or to be filed are to be considered settled as of this date.
>
> 2. The Company will pay for all unused vacation calculated in accordance with Article IX of the current Agreement.
>
> 3. The Company will pay for all accrued vacation in accordance with Article IX of the current Agreement.
>
> 4. Hospital, Surgical, Medical, Major Medical, Vision and Dental Coverage in effect for eligible branch bargaining employees and their eligible dependents will be continued through the month of January, 1991.
>
> 5. The Company will extend a separation benefit in the amount of (64) sixty-four hours at straight time wages.

After December 20, without any hiatus, the business was operated by Respondent. On January 2, 1991, the Union sent a letter to Dwyer, care of Respondent, in which it requests recognition for the unit employees and asks to begin bargaining for a collective-bargaining agreement. The letter was received by Respondent on January 7.

C. *Was the Respondent a Successor Employer on January 7?*

In *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), the Supreme Court reaffirmed and clarified its holding and analysis in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), which defined the obligation of successor employers to bargain with unions that represent the employers of their predecessors. The successor employer,

Fall River, operated a dyeing and finishing plant. Its predecessor, Sterlingwale, had used two types of dyeing, "commission" and "converting," but Fall River engaged exclusively in commission dyeing, which had accounted for 30 to 40 percent of Sterlingwale's business. Fall River purchased Sterlingwale's plant, real property, and equipment on the open market. Of its initial workforce, 36 of 55 employees had been employed by Sterlingwale, and 8 of 12 supervisors had been supervisors of Sterlingwale. Sterlingwale went out of business in late summer of 1982, and Fall River began operating in September 1982, but did not reach capacity until April 1983.

The Court stated that in determining whether a new company is a successor, the approach

> which is primarily factual in nature and is based upon the totality of the circumstances of a given situation, requires that the Board focus on whether the new company has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations." *Golden State Bottling Co. v. NLRB*, 414 U.S., at 184. Hence, the focus is on whether there is "substantial continuity between the enterprises. Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." [*Fall River*, supra at 43.]

The Court further stated that:

> In conducting the analysis, the Board keeps in mind the question whether "those employees who have been retained will understandably view their job situations as essentially unaltered." See *Golden State Bottling Co.*, 414 U.S., at 184; *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 464 (CA9 1985). This emphasis on the employees' perspective furthers the Act's policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest. See *Golden State Bottling Co.*, 414 U.S. at 184. [*Fall River*, supra at 43-44.]

Applying this test, the Court found that Fall River was a successor to Sterlingwale. The Court stated:

> Petitioner acquired most of Sterlingwale's real property, its machinery and equipment, and much of its inventory and materials. It introduced no new product line. Of particular significance is the fact that, from the perspective of the employees, their jobs did not change. Although petitioner abandoned converting dyeing in exclusive favor of commission dyeing, this change did not alter the essential nature of the employees' jobs, because both types of dyeing involved the same production process. The job classifications of petitioner were the same as those of Sterlingwale; petitioner's employees worked on the same machines under the direction of supervisors most of whom were former supervisors of Sterlingwale. The record, in fact, is clear that petitioner acquired Sterlingwale's

> assets with the express purpose of taking advantage of its predecessor's work force. [Id. at 44.]

In making its determination, the Court did not find the 7-month hiatus between the two companies' operations to preclude successorship because other factors indicated a substantial continuity. The Court also did not rely on Fall River's purchase of Sterlingwale's assets on the open market or various differences between the two enterprises, such as Fall River's reduced size, changes in marketing and sales, and failure to assume Sterlingwale's liabilities or trade name. The Court also upheld the Board's rule which fixes the successor's bargaining obligation at the time that it has hired a "substantial and representative complement" of employees.

In *Eastone of Ohio, Inc.*, 277 NLRB 1652, 1653 (1986), the Board listed the following criteria for determining successorship status: (1) business operations; (2) plant; (3) work force; (4) jobs and working conditions; (5) supervisors; (6) machinery, equipment, and methods of production; and (7) product or service.

Applying the foregoing criteria to the facts of record leaves no doubt that the Respondent is a successor to the involved Mack branch. Pursuant to its agreement with Mack, Respondent purchased all existing furniture, fixtures, shop supplies, machines, and tools used at the involved facility. It purchased a little more than a third of the existing parts inventory. It also purchased a flat bed truck from Mack. Respondent bought three delivery trucks from another source to develop its parts business, something Mack did not attempt. Of the some 150 new trucks and 200 used trucks Mack had for sale at the

facility, Respondent purchased about 5 of each. Respondent purchased all real property involved. Under the distributorship portion of the agreement, Mack assigned Respondent an exclusive dealership territory that was the same as the territory formally served by the factory branch.

Mack primarily engaged in fleet sales of new and used trucks, with attendant parts, maintenance, and service sales at the Allentown branch. Respondent continues to sell new and used trucks at the facility, although it does not engage in fleet sales of trucks. The fleet sales business was shifted to other Mack branches. Because of this shift the gross revenues of Respondent are substantially less than that of the branch, about $9 million annually for Respondent compared to $90-100 million annually for the branch. Respondent hopes to sell about 90 trucks annually compared with sales of about 2400 trucks for the branch. Most significantly for the purposes of this analysis however, Respondent continues to provide service, maintenance, and parts for new and used trucks to many of the customers formerly served by Mack.

The difference in scale of the truck sales business between Mack and Respondent is not mirrored in the business done by the involved bargaining unit employees in service and parts sales. Respondent began business with about two thirds of the employees in the bargaining unit, all of whom perform the same work, using the same equipment as they did with Mack. At the time it ceased operations on December 20, 1990, Mack employed 32 service mechanics, 11 parts employees, a shop clerk, and a janitor. By January 1, 1991, Respondent employed 23

mechanics, 7 parts employees, a computer operator (formerly the shop clerk), and a janitor. All of these employees had been bargaining unit employees of Mack at the date it ceased operations.

Management personnel working at the branch for Mack became the management for Respondent, with the exception of the parts manager and a newly created position of director of modifications center. Most of the service employees work under the same management team of Service Manager David Worth, Foreman Christ, and Night Shift Supervisor Grimm. Respondent also hired two new truck salesmen from the former Mack work force and hired one new person in this position as well as a new parts salesman. Four clerical employees of Mack were hired by Respondent to fill similar positions in the new operation.

Respondent completed unfinished repair and service work booked with Mack and not completed by December 20. With respect to service and maintenance customers, Respondent continues to serve many of the same fleet and individual customers formally served by the Mack branch, losing one fleet to Mack and adding a new fleet not previously served by Mack.

With respect to differences between Respondent's operation and that of Mack in the service and maintenance area, Dwyer pointed out that its modifications center offers and provides value added extras to new truck customers that the branch did not provide to any significant degree. This new work accounts for about 30 percent of the Respondent's current volume of business. The Respondent is also trying to develop new business in

the repair and maintenance of fire fighting equipment. It now devotes 11 of its 18 repair bays to these ventures whereas Mack devoted 2 or 3 bays to similar work. Although Mack, using the services of its bargaining unit employees, performed some modification work, it farmed out or subcontracted most of this type work to another company. However, the involved employees had performed at one time or the other, virtually all the modifications now provided by Respondent. Mack also advertised that its branch offered such modification services. When Respondent began business, it assigned one leadman and five or six employees to this work. These were former Mack bargaining unit employees. As the work has grown, employees have been hired to perform this work and/or existing employees have been shifted to this work, which accounted for as many as 12 employees during a busy period in March 1991. It has purchased some specialty welding equipment and other equipment for its modifications center. Respondent purchased computers and computerized its operation. As noted above, all other equipment and machinery used was formerly Mack machinery and equipment and all other work performed by the parts and service employees is exactly as it had been with Mack.

In conclusion, from the perspective of Respondent's service and parts employees, very little changed when their employment shifted from Mack to Respondent. They work in the same building, using the same equipment, performing the same work for many of the same customers, working the same hours and shifts under virtually the same supervision as was the case in their employment with Mack. The change in the scale of the

operation was not dramatic insofar as they are concerned, and the change in the direction of the business to stress modification work is no more of a change than was the change in the dyeing process used in *Fall River*, supra. The involved employees are certainly a representative complement of the former bargaining unit as virtually all the Respondent's service and parts employees as of January 1991 were former bargaining unit members. Respondent's operation in January was relatively full scale and no dramatic increase in business or change in direction of business was foreseen or has occurred that would make the complement of employees hired as of that date less than representative.

Accordingly, I find that Respondent was a successor employer to the Allentown Mack branch with respect to the bargaining unit employees represented by the Union and that it was legally obligated to recognize and bargain with the Union, unless it can show that it had a good-faith reasonable doubt of the Union's majority status sufficient to rebut the presumption of majority status enjoyed by the Union at the time the request for recognition was made.

D. Did Respondent Have a Good-Faith Reasonable Doubt as to the Union's Majority Status Among its Involved Employees?

As noted above, the Union made its request for recognition by letter to Respondent dated January 2, 1991, and received by Respondent on January 7. There was no

other communication between the parties, until Respondent replied by letter dated January 25, 1991. This letter, received by the Union on January 31, reads as follows:

> At least until further investigation, the Company must decline to enter into bargaining because:
>
> 1. It is not a successor to Mack Trucks, Inc. (Mack) The Company purchased certain assets belonging to Mack for cash, and acquired part, but not all, of the business carried on by Mack. The purchase documents specifically disclaim successorship. The Company is completely independent, and none of its stock is owned by Mack.
>
> With respect to your representation of Mack employees, we understand that it ceased upon settlement of the effect of Mack's ceasing and terminating its business at the Allentown Branch of Mack. The Union agreed that the collective-bargaining agreement became null and void upon completion of a settlement including severance pay.
>
> 2. There is a good faith doubt as to support of the Union among the employees hired by the Company. Objective evidence has convinced the Company's management that a majority of its hourly employees do not desire to be represented by the Union.
>
> In order to avoid possible protracted and unproductive dispute over this issue, the Company has arranged for an independent poll by secret ballot of its hourly employees to be conducted under guidelines prescribed by the National labor Relations Board. The poll will be taken on February 8, 1991.

> We shall await the results of the poll before communicating further. I am sure that you will agree that this method of proceeding respects the wishes of the employees, a central policy of the National Labor Relations Act.

The poll was taken and the results sent to the Union by Father Joseph Czaus, a Catholic priest who conducted the poll. His letter reads:

> The results of the poll of employees of Allentown Mack Sales and Service, Inc, conducted on February 8, 1991, are as follows:
>
> 13 employees voted I do want to be represented for purposes of collective bargaining by Automobile & Body Builders Local No. 724, International Association of Machinists and Aerospace Workers.
>
> 19 employees voted I do not want to be represented for purposes of collective bargaining by Automobile & Body Builders Local No. 724, International Association of Machinists and Aerospace Workers.
>
> As an independent third party, I witnessed the poll, collected the ballots, and have verified the results.

On February 12, 1991, the Union responded to the poll by a letter to Respondent which stated:

> In response to the letter received from Father Joseph Czaus concerning the poll of Allentown Mack employees, Local 724 does not recognize this poll or the results of said poll.
>
> Local 724 will continue whatever legal action is necessary to see that Allentown Mack complies with the labor laws.

Other than the communications above noted, there has been no communication between the Union and Respondent.

The poll, which will be discussed in more detail below, does give strong support to Respondent's position that the Union did not enjoy majority status and that it was not obligated to recognize and bargain with the Union. However, before it can rely on the results of the poll, it must show that it had a good-faith reasonable doubt, based upon objective considerations, of the continuing majority status of the Union before conducting the poll. This reasonable doubt must be based on sufficient objective considerations to justify withdrawal of recognition from and incumbent union and must have been formed in an atmosphere free of any unfair labor practices. *Texas Petrochemicals Corp.*, 296 NLRB 1057 (1989).

Respondent cannot rely upon the Union's agreement which terminated the collective-bargaining agreement with Mack as of December 20, 1990. This agreement did not affect the Union's rebuttable presumption of majority status and did not amount to a waiver of the Union's rights in this regard. *Bay Area Mack*, 293 NLRB 125, 128 at fns. 11 & 12 (1989). Moreover, Respondent was on notice that the Union expected to be recognized by the statements of James Walsh made at the effects bargaining session of December 6. Likewise, the lack of a successorship clause in the Mack-Union collective-bargaining agreement cannot affect the Union's rights which arise under the Act and not as a result of contract. The lack of such a clause does not constitute a knowing waiver of these rights.

With respect to labor relations, the document which effected the purchase of the Allentown Mack branch by Respondent provides in its paragraph 14:

> No provision of this Memorandum or any other agreement by and between Mack and Buyer shall require Buyer to recognize, assume, or be bound by any existing labor agreement of Mack. Buyer shall have no obligation, and Mack will indemnify Buyer, with respect to any and all claims and liabilities arising under said labor agreements or from Mack's employment relationship with the Mack employees of the Branch. The provisions of this paragraph fourteen shall survive the closing.

This agreement, which does not include the Union as a party, cannot be found binding on the Union, and does not bear on the issue of whether Respondent has an objective reasonable doubt as to the Union's majority status.

The primary evidence relied upon by Respondent to meet its burden under the reasonable doubt standard consists of statements made by bargaining unit employees to management which Respondent interprets as showing employee dissatisfaction with the Union. These statements were made either directly to Dwyer over a period of time or were made to his service manager, Worth and his parts manager, Hamershock, while they were interviewing Mack employees for positions with Respondent. The antiunion comments made to the supervisors were reported to Dwyer. Both Worth and Hamershock testified that the comments about the Union were made to them without prompting on their part. I do not find that they asked the union sympathies of the job

applicants, but I do believe the testimony of both employees Mike Ridgick and Ronald Mohr that they were told during their interviews that the new company would be nonunion. Thus, I feel that the statements made to Worth and Hamershock are somewhat tainted as it is likely that a job applicant will say whatever he believes the prospective employer wants to hear. See *Phoenix Pipe & Tube Co.*, 302 NLRB 122 fn. 2 (1991). Similarly, during the period just prior to December 20, if an employee asked whether the new business would be union or not, Dwyer would answer that it would not. He could not remember being specifically asked this by any employee, though he was frequently asked by business associates and customers.

The statements and comments upon which Dwyer based his good-faith doubt of majority status are as follows:

In 1989, before the renewal of the last collective-bargaining agreement, bargaining unit member Mike Ridgick asked him what Mack could offer that the Union could not, noting there had been a number of decertifications at Mack facilities and wanting to know what he could do in this regard.[5] Dwyer responded he could not give him information about this and he should contact his counterparts at other Mack facilities.

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[5] On cross-examination, Dwyer was uncertain whether this conversation took place in 1989 or in 1986, the year the previous collective-bargaining agreement was negotiated. I believe the best evidence would place the date of this conversation in 1986, as Ridgick was assistant parts manager in 1989 and not a member of the bargaining unit.

Ridgick was interviewed for a position with the Respondent. Although he was a supervisor with Mack at the time he was interviewed, the position he was applying for would be a bargaining unit position. He was interviewed by Respondent's new parts manager, Hamershock. According to Hamershock, he mentioned nothing about the Union, but Ridgick offered that as long as the new company would treat them right, there was no need for a Union. Ridgick admitted making this comment but said it was in response to being told by Hamershock that the new company would be non-union. I find Ridgick's testimony as to the reason for making the comment more plausible and credit it over the testimony of Hamershock.

I consider the 1986 conversation between Dwyer and Ridgick to be too remote to properly judge Ridgick's union sympathies in early 1991. The statement he made to Hamershock also tends to detract from his earlier expression of dissatisfaction. The later statement is at best equivocal and amounts to nothing more than a noncommital acceptance of the conditions of the job being offered. As Ridgick was a member of management at the time he made the statement, I would find it hard to believe that he would express any prounion sentiment during the job interview. The comment he did make is certainly not the expression of pleasure that one would expect if Ridgick wanted the Union decertified as indicated in his earlier conversation with Dwyer. I cannot find that this 1990 comment made during the job interview would support an objective reasonable doubt of majority status.

In either 1986 or 1989, Dwyer had a conversation with a long time bargaining unit employee, Bill Wendling, who retired at some date before Respondent purchased the Allentown Mack branch. Wendling told him he wished he could be in management because it had a better retirement package. This statement could only be interpreted as expressing Wendling's desire for a benefit which management did not afford bargaining unit members. By no stretch of the imagination could it be said to be clear expression of a desire to end his representation by the Union. I can not find this statement even remotely supports Respondent's asserted good-faith doubt.

Again, in either 1986 or 1989, Dwyer had a conversation with bargaining unit member Pete McArthur wherein McArthur asked him for information about decertification. Dwyer referred him to his counterparts at other branches of Mack. Not only do I find this conversation remote to the timeframe in question, McArthur was not hired by Respondent and his sentiments made no difference in determining whether the Union was supported by a majority of Respondent's employees.

In July 1990, when the WARN letter was prepared, Dwyer held an employee meeting and read the letter to the employees. After this meeting, a parts department bargaining unit employee and union steward, Dennis Wehr, told him that if Dwyer was elected principal of a new company, that "we didn't have to have a union, because we didn't need one." Wehr was hired by Respondent in December, but quit on January 23, 1991. I believe that Wehr's statement would properly cause an employer to doubt this employee's support for the Union. However, as Wehr quit his employment with Respondent before it

replied to the Union's request for recognition, I do not believe it could properly count this person in its determination of whether a majority of its employees supported the Union.

In December, a mechanic who works in the fire department, Rusty Hoffman, told Dwyer that if the new company was going to be union that he was not interested in working because he did not want to work in a union shop. In his interview with Worth for a job with Respondent, Hoffman said he would vote out the Union and would try to find another job if he had to work with the Union. I believe that at least Hoffman's comment to Dwyer could be used to support Respondent's good-faith doubt.

During his job interview with Worth, employee Joe McKilvie asked him if there was going to be a Union in the new company. Worth replied that at that time he did not know, to which McKilvie responded that he was against the Union and "we would work better without one." I believe this comment is strong enough indication of antiunion sentiment to be used by Respondent, even though given in the context of an interview.

In his job interview, employee Milt Solt offered that he did not feel comfortable with the Union and thought it was a waste of $35 a month. This statement is not a clear expression of a desire not to be represented and is the type statement which I believe is weakened because of the context in which it was given.

Interviewee Dennis Marsh said he was not being represented for the $35 he was paying. Although this statement does express dissatisfaction with the Union, it

certainly does not amount to a statement that Marsh does not want to be represented by the Union. It seems more an expression of a desire for better representation than one for no representation at all.

Randy Zoltack, who was hired in February, before the poll, told Hamershock the Union was a waste of $35. As Zoltack was hired after the January 25 reply to the Union, his feelings could not have been part of Respondent's good-faith doubt as of that date.

During his job interview, employee Tim Frank mentioned to Worth that "he didn't feel that he wanted to work with the Union now," or "that he would rather not have the Union there." Although Worth's memory of this employee's statements was less than strong, I will credit the testimony and thus agree with Respondent's position that Frank's statement contributed to its asserted good-faith doubt.

During their job interviews with Worth, employees Scot Murphy and Kermit Bloch mentioned they did not want the Union. Dwyer testified that on a number of unspecified occasions after Murphy was hired, Murphy expressed his dissatisfaction with the Union and the dues he was paying. Bloch, who worked on the night shift, told Worth that the entire night shift did not want the Union. There were five or six employees on the night shift at the time. I cannot accept Bloch's representations with respect to the other night shift employees for a variety of reasons. Bloch did not testify and thus could not explain how he formed his opinion about the views of his fellow employees. There is no showing that they made independent representations about their union sympathies to

Respondent and they did not testify in this proceeding. See *Texas Petrochemicals Corp.*, supra, 296 NLRB 1057 (1989). I believe, however, the Respondent can rely on the statements of these two employees as indicating their desire not to be represented by the Union.

Hamershock testified that when interviewing employee David Baker, Baker asked, "What are you going to do about the Union?" Hamershock replied, "That is totally up to the people, I don't know." Baker then said, "That is good because as far as I am concerned, I have no use for it." I believe Respondent should be allowed to use this statement as evidence of its asserted good-faith doubt.

To this point, I find that six employees gave Respondent statements which could be used as objective considerations supporting a good-faith reasonable doubt as to continued majority status by the Union.[6] Even if one counts the statement of employee Milt Solt in this category, which is questionable, only 7 of 32, or roughly 20 percent of the involved employees had expressed sufficient dissatisfaction to support Respondent's position. I cannot find that this level of expressed dissatisfaction constitutes an objective reasonable doubt of union majority support among the unit employees sufficient for a lawful withdrawal of recognition and thus, the conducting of a lawful

[6] These employees are Rusty Hoffman, Joe McKilvie, Tim Frank, Scott Murphy, Kermit Block, and David Baker.

employee poll. *Texas Petrochemicals*, supra; *Hajoca Corp.*, 291 NLRB 104 (1988).[7]

Thus I find crucial to the Respondent's position the last conversation upon which it relies. In December, prior to the interview process, Dwyer and employee and union steward for the service employees, Ron Mohr, engaged in a conversation in which the Union was discussed. Dwyer remembers it taking place in the shop and beginning by Dwyer asking how things were going. He said that Mohr told him that with a new company, if a vote was taken, the Union would lose and that it was his feeling that the employees did not want a union. Dwyer replied that it was up to the employees and he would go either way.[8]

[7] I likewise doubt that it would satisfy the somewhat lesser standard untilized as a prerequisite for a lawful employee poll by three Federal Circuit courts that have rejected the Board's standard. *Mingtree Restaurant v. NLRB*, 736 F.2d 1295 (9th Cir.1984); *Thomas Industries v. NLRB*, 687 F.2d 863 (6th Cir.1982); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir.1981). These courts have held that an employer may poll its employees to determine their union sentiment if the employer has substantial, objective evidence of loss of union support, even if that evidence is insufficient in itself to justify withdrawal of recognition. As this standard is not the standard used by the Board, and as I am bound to follow Board law, the evidence will not be further discussed in relation to the courts' standard.

[8] Michael Walsh testified that at a meeting of 29 or 30 of the Mack bargaining unit members on December 16, 1990, some 25 signed authorization cards selecting the Union as their bargaining representative. Of course, on that date, the Respondent was not in business. More importantly, the Union never informed Respondent that it was in possession of these cards and never offered to show them to Respondent or an independent third party to verify majority status. In a similar vein, Walsh testified that most of the unit employees of

Mohr testified that in December, prior to the change in ownership, he was called into Dwyer's office and they had a brief conversation about the Union. Dwyer asked him how things were going in the shop, and Mohr replied they were all right. Dwyer then asked him how he felt about the Union. Mohr said he could work with or without the Union; he was there to do his job. Dwyer said that he too could work either way, with or without the Union. It would be up to the men. He asked how the other men felt about the Union and Mohr said he could not speak for the other employees.

Mohr was interviewed for a position with Respondent by Worth who told him what Respondent had to offer by way of wages and benefits, and that it would be a nonunion shop.

Respondent strongly relies on the statement made by Mohr to Dwyer. It urges and I accept that that the version of the statement given by Dwyer should be credited. As Dwyer testified after Mohr and his version of the conversation was materially different, I believe General Counsel had an obligation to call Mohr to comment on Dwyer's testimony in this regard. This is especially so as Mohr mentioned in his testimony having other conversations with Dwyer at about the same time as the one he

---

Respondent continued to pay union dues, albeit drastically reduced dues, after Respondent began business. Respondent was not in a position to know whether dues were being paid or not, and was not informed by the Union that dues were in fact being paid. As these facts, which may have had a bearing on the matter of Respondent's good-faith doubt were they known by it, were never communicated to Respondent, I do not believe they have any relevance on this issue.

described. Additionally, Dwyer appeared entirely credible on this point.

Should Respondent be allowed to rely on Mohr's opinion? As opposed to Bloch who offered the opinion that the night shift employees did not support the Union, Mohr, as union steward, was arguably in a position to know the sentiments of the service employees in the bargaining unit in this regard. However, there is no evidence with respect to how he gained this knowledge, or whether he was speaking about a large majority of the service employees being dissatisfied with the Union or a small majority. Moreover, he was referring to the existing service employee members of the Mack bargaining unit composed of 32 employees, whereas the Respondent hired only 23 of these men. Certainly the composition of the complement of employees hired would bear on whether this group did or did not support the Union. He also was not in a position to speak for the 11 parts employees of Mack or the 7 parts employees hired by Respondent. Mohr himself did not indicate personal dissatisfaction with the Union.

Given the almost off-the-cuff nature of the statement and the Board's historical treatment of unverified assertions by an employee about other employees' sentiments, I do not find that Mohr's statements provides sufficient basis, even when considered with the other employee statements relied upon, to meet the Board's objective reasonable doubt standard for withdrawal of recognition or for polling employees. *Texas Petrochemicals*, supra; *Westbrook Bowl*, 293 NLRB 1000 (1989); *KEZI-TV*, 286

NLRB 1396 (1987). Accordingly, I find that the Respondent unlawfully polled its employees about their continued support for the Union, because it did not have the prerequisite reasonable doubt, based on objective considerations, about the Union's continued majority status. Consistent with this finding, I find that the Respondent cannot rely on the results of the poll as an objective consideration, because the poll itself was an unfair labor practice, establishing an unlawful context for withdrawal of recognition. *Texas Petrochemicals*, supra. Thus, I find that Respondent's refusal to extend recognition and bargain with the Union within a reasonable time on and after receipt of the Union's request on January 7, 1991, violated Section 8(a)(5) and (1) of the Act. I also find that by conducting the poll, Respondent violated Section 8(a)(5) and (1) of the Act.

E. Did the Poll Taken by Respondent Independently Constitute a Violation of the Act?

The complaint alleges that Respondent, on February 8, 1991, acting through Robert Dwyer, unlawfully interrogated its employees regarding their union membership and sympathies. The allegation, though perhaps vaguely drawn, must refer to the employee poll taken on February 8, because Dwyer did not personally interrogate anyone about anything on that date according to the evidence of record. Therefore, I will discuss the evidence relating to the poll to determine if its taking by Respondent violated the Act independently of the violation found in the preceding section of this decision.

After receipt of the January 2 letter requesting recognition and following his response of January 25, in accordance with his reply, Dwyer posted a notice in the Allentown facility that a poll regarding union preference would be taken. This notice reads as follows:

> The International Association of Machinists and Aerospace Workers Local #724 has demanded to be the exclusive bargaining agent for all the shop maintenance employees, shop clerks, and partsmen.
>
> The Company, Allentown Mack Sales and Service, Inc. has arranged for an independent poll to be conducted by secret ballot under the guidelines prescribed by the National Labor Relations Board.
>
> The purpose of the poll is to determine the wishes of our employees, with respect to representation for collective bargaining.

On February 8, the date of the poll, Dwyer held two meetings with employees. In each he read a statement which said:

> A poll of our employees will be conducted on the supervision of Father Czaus this afternoon. The purpose of this poll is to ascertain whether the International Association of Machinists and Aerospace Workers, Local Union No. 724, actually represents the majority of the company's employees covered by the National Labor Relations Act.
>
> We want to assure you that no reprisals will be taken against any employee regardless of how he votes, or the outcome of the poll.

> The poll will be taken by secret ballot, and only Father Czaus will see the ballots. He will simply report the results to us, and those results will be posted and communicated to the Union.
>
> That is all I have to say about the poll. If you have any questions about the polling procedure, please ask Father Czaus after I have left the room.

Father Czaus conducted the poll in which all employees who would be in the bargaining unit voted. He then took the ballots, left the premises, and later advised the Company and the Union of the results.

Where an employer has demonstrated a reasonable doubt about a union's continued majority status, the Board has generally accepted the adequacy of the procedural safeguards for employer-conducted polls of employees set forth in *Struksnes Construction Co.*, 165 NLRB 1062 (1967), i.e., (1) the purpose of the poll is to determine whether the union enjoys majority support; (2) the purpose is communicated to the employees; (3) assurances against reprisals are given; (4) the employees are polled by secret ballot; and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

If one assumes for the purposes of this discussion that Respondent did have sufficient objective grounds for a good-faith doubt of the continuing majority status of the Union, then I believe that the poll was conducted within the guidelines of *Struksnes*. Had it had such a good-faith doubt, then it would not have committed any unfair labor practices to the date of the poll and there is virtually no evidence that the poll was conducted in a

coercive atmosphere. General Counsel would have me find that regardless of Respondent's good-faith doubt, the poll was conducted in an atmosphere tainted by Respondent's refusal to recognize the Union on January 7 and by its refusal to bargain with the Union prior to the poll. I disagree. I believe Respondent's January 25, 1991 response to the Union's January 2 request was reasonably timely and does not by itself amount to a refusal to recognize and bargain with the Union. By its very terms, it merely postpones that decision until the results of the employee poll are known.

As noted in the fact findings above, the employees were informed of the purpose of the poll, the purpose was permissible, assurances against reprisals were given, and the poll was by secret ballot conducted by an independent third party.

In *Texas Petrochemicals*, supra, 296 NLRB 1057 (1989), the Board added a new requirement for such polls. In that case, the Board held that the union must be given advance notice of the time and place of the poll. The Union received notice that the poll would be taken on February 8, 1991, when, on January 31, it received Respondent's letter of January 25. Although the specific time and place of the poll was not stated, and perhaps on January 25, not known to Respondent, the Union was on notice of the intention to take the poll and its date. I believe that the Union had at least the minimal responsibility to inquire as to the time and place, and if it had objections to them, to voice such objections. In the absence of such objections, I cannot find that the purpose of requiring advance notice has been violated. Similarly, on brief, the Union raises a number of objections to the

poll, questioning the integrity of Father Czaus and the appropriateness of the location of the poll. Absent any inquiry by it about how the poll was to be taken and voicing timely objection, I do not find its late formed objections to be well taken. This is especially true because there is nothing in the evidence given by the employees who participated in the poll to indicate that there was anything questionable or coercive about the poll.

Therefore I find that the poll meets the Board's guidelines and the manner in which it was taken does not violate the Act. However, as I have heretofore found that the taking of the poll was unlawful and unavailing to the Respondent, this point is relatively moot.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All shop employees, shop clerks and partsmen employed by Respondent at its Allentown, Pennsylvania facility, excluding office clerical employees, drivers, salesmen, and watchmen and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing on or after January 7, 1991, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the

appropriate unit, and by taking an employee poll to verify the continuing majority status of the Union, all without sufficient objective considerations on which the Respondent could base a reasonable doubt about the Union's continued majority status, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not engage in other unfair labor practices as alleged in the complaint.

Remedy

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

It is recommended that Respondent be ordered to extend recognition to, and upon request, bargain with the Union as the exclusive collective-bargaining representative for its employees in the above-described unit, over the terms and conditions of employment of these employees and, if agreement is reached, embody such agreement in a written contract.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

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[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and

ORDER

The Respondent, Allentown Mack Sales & Service, Inc., Allentown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Local Lodge #724, International Association of Machinists and Aerospace Workers, AFL – CIO as the exclusive collective-bargaining representative of the employees in the appropriate unit, and taking an employee poll to verify the continuing majority status of the Union, without sufficient objective considerations on which it could base a reasonable doubt about the Union's continued majority status.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Extend recognition to and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit over terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All shop employees, shop clerk and partsmen employed by Respondent at its Allentown, PA

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recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

> facility, excluding office clerical employees, drivers, salesmen, and watchmen and supervisors as defined in the Act.

(b) Post at its Allentown, Pennsylvania facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with Local Lodge #724, International Association of Machinists

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[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and Aerospace Workers, AFL – CIO as the exclusive collective-bargaining representative of our employees in the unit described below, and WE WILL NOT take an employee poll to verify the continuing majority status of the Union, without sufficient objective considerations on which we could base a reasonable doubt about the Union's continued majority status.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL extend recognition to and, on request, bargain in good faith with the Union as the exclusive representative of our employees in the following appropriate unit over terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All shop employees, shop clerks and partsmen employed by us at our Allentown, Pennsylvania facility, excluding office clerical employees, drivers, salesmen, and watchmen and supervisors as defined in the Act.

ALLENTOWN MACK SALES & SERVICE, INC.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1272 **September Term, 1996**

Allentown Mack Sales and Service, Inc., (Filed Sep. 13, 1996)

Petitioner

v.

National Labor Relations Board,

Respondent

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Petitioner's Suggestion For Rehearing *In Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judges Williams and Sentelle would grant the suggestion.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1272 **September Term, 1996**

Allentown Mack Sales and Service, Inc., (Filed Sep. 13, 1996)

Petitioner

v.

National Labor Relations Board,

Respondent

BEFORE: Sentelle, Randolph and Rogers, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing, filed July 1, 1996, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Sentelle would grant the petition for rehearing.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1272 **September Term, 1996**

Allentown Mack Sales and Service, Inc., (Filed Oct. 24, 1996)

Petitioner

v.

National Labor Relations Board,

Respondent

BEFORE: Sentelle, Randolph and Rogers, Circuit Judges

ORDER

Upon consideration of petitioner's motion for stay of mandate, the response thereto and of the reply, it is

ORDERED that the motion is granted. The Clerk is directed to withhold issuance of the court's mandate for a period of thirty days from the date of this order.

Per Curiam

FOR THIS COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A Bonner
Robert A Bonner
Deputy Clerk

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(3)

No. 96-795

In the Supreme Court of the United States

OCTOBER TERM, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel
LINDA SHER
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner committed an unfair labor practice by polling its employees about their continued support for their union when petitioner did not have a good-faith reasonable doubt as to the union's majority status.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 83 F.3d 1483. The decision and order of the National Labor Relations Board (Pet. App. 19-27) and the decision of the administrative law judge (Pet. App. 28-64) are reported at 316 N.L.R.B. 1199.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1996. A petition for rehearing was denied on September 13, 1996. Pet. App. 66-67. The petition for

a writ of certiorari was filed on November 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 5, 1990, petitioner purchased a truck sales and repair facility in Allentown, Pennsylvania, from Mack Trucks, Inc. Mack had previously recognized Local Lodge No. 724, International Association of Machinists, AFL-CIO (the Union) as the exclusive representative of a bargaining unit of service and parts department employees at the facility. Pet. App. 29, 30, 32. By January 1, 1991, petitioner hired into the bargaining unit 32 employees, all of whom had been employed by Mack on the date it ceased operations. *Id.* at 39-40.

On January 2, 1991, the Union requested petitioner to recognize it as the bargaining representative of the unit employees, and to commence negotiations for a contract covering those employees. Pet. App. 35. On January 25, 1991, petitioner rejected the Union's request. Petitioner asserted that "[t]here is a good faith doubt as to support of the Union among the employees hired by the Company," and informed the Union that, "[i]n order to avoid possible protracted and unproductive dispute over this issue," it would arrange for an "independent poll" of the employees in the bargaining unit by secret ballot on February 8. *Id.* at 43. At the poll, 13 employees cast ballots for representation by the Union, and 19 cast ballots against the Union. *Id.* at 44.

2. Acting on unfair labor practice charges filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint against petitioner. Pet. App. 28. An administrative law judge

(ALJ) concluded that petitioner had committed an unfair labor practice by taking the poll and refusing to bargain with the Union, *id.* at 28-64, and the Board agreed, *id.* at 19-27.

a. The ALJ initially concluded that petitioner was a successor to Mack and was therefore presumptively obligated to recognize and bargain with the Union, which enjoyed a rebuttable presumption of continued majority status in the bargaining unit after petitioner commenced operations. Pet. App. 32 n.4, 38-42. The ALJ then observed that, under Board precedent, an employer may conduct a poll of its employees to test a union's continued support only if the employer has a "good-faith reasonable doubt, based upon objective considerations, of the continuing majority status of the [u]nion before conducting the poll." *Id.* at 45 (citing *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989), remanded as modified, 923 F.2d 398 (5th Cir. 1991)). That standard, the ALJ noted, is also the standard required by the Board "to justify withdrawal of recognition from an[] incumbent union." Pet. App. 45.

After examining petitioner's proffered evidence in support of its alleged good-faith reasonable doubt as to the Union's majority status, the ALJ found that, as of January 25, 1991, only six or seven of the 32 employees in the bargaining unit (approximately 20% of the unit) had clearly indicated that they no longer desired to be represented by the Union. Pet. App. 52. That evidence, the ALJ concluded, was insufficient to constitute "an objective reasonable doubt of union majority support," and therefore did not justify the poll conducted by petitioner. *Id.* at 52-53.

The ALJ also noted that the Fifth, Sixth, and Ninth Circuits apply a "somewhat lesser standard" in deter-

mining the legality of employer polls. Pet. App. 53 n.7. Under those courts' standard, an employer may conduct an employee poll to test continued union support if it has "substantial, objective evidence of loss of union support, even if that evidence is insufficient in itself to justify withdrawal of recognition." *Ibid.* The ALJ expressed "doubt" that petitioner's evidence of loss of support by only 20% of the employees in the bargaining unit would satisfy even the standard applied by those courts. *Ibid.*

b. With certain modifications not relevant here, the Board affirmed the ALJ's findings and conclusions. Pet. App. 19-27. The majority of the Board agreed with the ALJ that petitioner lacked a reasonable doubt of the Union's majority status when it conducted the poll, and that, under its *Texas Petrochemicals* decision, petitioner was therefore not entitled to take the poll. *Id.* at 25-26. The Board also noted (as had the ALJ) that some courts of appeals have endorsed a "more lenient standard for polling." *Id.* at 26 n.9. It found, however, that "the showing made by [petitioner] (6 or 7 employees opposed to the Union out of a bargaining unit of 32)" was "insufficient" to meet even those courts' polling standard. *Ibid.* Board Member Stephens agreed that petitioner's evidence did not satisfy even the more lenient standard for polling and would have affirmed the ALJ's findings on that basis. *Ibid.*

3. A divided panel of the court of appeals enforced the Board's order. Pet. App. 1-18. The panel upheld the Board's policy of permitting employer polling only if the employer has "objective indications sufficient to raise a reasonable doubt about the union's majority status"—which is the same standard that would permit an employer to withdraw recognition from a

union, or to petition for a Board-conducted election to test the continued support of the union (an "RM" election). *Id.* at 3. The court acknowledged that the Fifth, Sixth, and Ninth Circuits have rejected the Board's standard for polling, but it disagreed with the analysis of those courts. *Id.* at 4 & n.1, 8.

The court observed that, even if the other courts' "basic proposition" were correct—"that the standard for polling should be lower than the standard for withdrawal of recognition"—that would not necessarily lead to the conclusion that the Board's polling standard should be relaxed. The same objective, the court noted, could be accomplished "by raising the Board's withdrawal-of-recognition standard." Pet. App. 6. The court also noted that the other courts of appeals that have rejected the Board's polling standard have created a different anomaly, by "making it easier for an employer to conduct an unsupervised poll than to have a Board-supervised RM election." *Ibid.*

The court found this to be an area in which deference to the Board is appropriate, since "[n]othing in the National Labor Relations Act specifically governs [employer polling.]" Pet. App. 7. Recognizing the Board's concern that polling employees about their support for an incumbent union is "potentially, if not inherently, both disruptive of the collective-bargaining relationship . . . and also unsettling to the employees involved" (*ibid.* (quoting *Texas Petrochemicals*, 296 N.L.R.B. at 1061)), the court concluded that, "[i]n light of these dangers, the Board, in its expert judgment, reasonably limited the circumstances in which employers may conduct polls." Pet. App. 7.

Applying the Board's polling standard, the court agreed with the Board that petitioner failed to meet that standard in this case. Pet. App. 9-12. Thus, the court sustained, as supported by substantial evidence, the Board's finding that petitioner did not possess a reasonable doubt about the Union's majority status as of January 25, 1991 (the date on which it refused to recognize the Union and announced it would poll the employees) because petitioner had reason to believe that "only 7 of the 32 employees had repudiated the union" as of that date. *Id.* at 12; see *id.* at 9.

Judge Sentelle dissented. Pet. App. 13-18. He agreed with the reasoning of other courts of appeals that have disapproved the Board's polling standard—namely, that under that standard, "an employer cannot conduct a poll to determine majority support unless it already has so much evidence of no majority support as to render the poll meaningless." *Id.* at 15. He also suggested that the record demonstrated "overwhelming objective evidence of the loss of majority support" for the Union in the bargaining unit. *Id.* at 18.

ARGUMENT

The court of appeals correctly upheld the National Labor Relations Board's longstanding rule that an employer violates Section 8(a)(5) and (1) of the National Labor Relations Act (Act)[1] by conducting a poll

[1] Section 8(a)(5), 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of" Section 9(a) of the Act. Section 9(a), 29 U.S.C. 159(a), provides, in relevant part, that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit." Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, among which is "the right * * * to bargain collectively through representatives of their own choosing." 29 U.S.C. 157.

of its employees about their continued support for their union unless, prior to the poll, the employer possesses a good-faith reasonable doubt, based on objective evidence, as to the union's continued majority status. That rule has been rejected by other courts of appeals. This case, however, is not an appropriate vehicle for this Court's resolution of the issue because petitioner's poll was unlawful even under the lower standard for polling articulated by the courts that have rejected the Board's rule. Moreover, the question whether the Board's polling standard represents a reasonable construction of the Act may soon become academic; in a case currently pending before the Board, the General Counsel has urged the Board to adopt new rules respecting the circumstances under which employers may withdraw recognition from, and poll employees represented by, certified unions. Accordingly, the Court's intervention is not warranted at this time.

1. a. As this Court has often explained, Congress gave the Board the "primary responsibility for developing and applying national labor policy." *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); see, *e.g.*, *Auciello Iron Works, Inc.* v. *NLRB*, 116 S. Ct. 1754, 1759 (1996); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). When the Act does not speak directly to an issue, the Court accords

"considerable deference" to the Board's interpretation and will uphold that interpretation if it is "rational and consistent with the Act." *Curtin Matheson*, 494 U.S. at 786-787; *Auciello Iron Works*, 116 S. Ct. at 1759; *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under those well settled principles, the court of appeals correctly upheld the Board's polling standard in this case.

As the court of appeals recognized (Pet. App. 7), the Act does not specifically address the subject of employer polls. The Board has concluded, in an exercise of its authority to interpret the Act's provisions, that an employer violates Section 8(a)(5) and (1) of the Act by polling its employees unless, prior to conducting the poll, the employer possesses a good-faith reasonable doubt as to the union's majority status. That position is of long duration, see *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974), and was recently reaffirmed by the Board after a reexamination of the matter, in light of the criticism of the policy expressed by some courts of appeals. *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989), remanded as modified, 923 F.2d 398 (5th Cir. 1991).

When it reconsidered and reaffirmed the polling standard, the Board undertook "[a] balancing of the various employer, employee, union, and statutory interests at stake." *Texas Petrochemicals*, 296 N.L.R.B. at 1062. The Board concluded that its "reasonable doubt" standard for polling is more consistent with the ultimate goal of the Act—stability in collective-bargaining relationships—than is the less stringent standard favored by the courts of appeals that had rejected the Board's rule. As the Board

explained, its standard "makes a poll neither easier nor more difficult to justify than a Board-conducted [RM] election." *Id.* at 1061. By contrast, the courts' less stringent standard—permitting a poll based on "substantial, objective evidence of loss of union support," even absent evidence of loss of majority status, see Pet. 11—"permits an employer to conduct a poll where the Board would not conduct an election and could thus lead employers to poll their employees about their support for an incumbent union where there is a reduced likelihood that the poll would establish an actual loss of majority support." 296 N.L.R.B. at 1061.

The Board's standard thus avoids the anomaly that would exist if a less stringent rule were adopted for polling, namely, that the standard for "an in-house, relatively informal poll" of employees would be less strict than that for a full-scale, formal Board-conducted RM election. See *Texas Petrochemicals*, 296 N.L.R.B. at 1060. A less stringent standard for polling would also increase the potential for disruption of collective-bargaining relationships. Polls, the Board has found, are "potentially, if not inherently, both disruptive of the collective-bargaining relationship between an employer and a union and also unsettling to the employees involved," for the very act of "[s]ubmitting a union's role as representative to an employer-initiated and conducted employee referendum raises * * * a doubt in the mind of an employee as to the union's status as his bargaining representative." *Id.* at 1061-1062. Employer-initiated polls, even if conducted with procedural safeguards, have a potential for friction and disruption that the Board was entitled to consider in fashioning its rule.

The Board also properly concluded that a lower standard for polling is not necessary to protect legitimate employer or employee interests. It explained that the rebuttable presumption of continued majority status enjoyed by an incumbent union "effectively insulates an employer against an allegation that it is unlawfully recognizing a minority incumbent union, and it also effectively relieves an employer of any obligation it might feel to withdraw recognition from an incumbent union whose majority support is doubted by the employer." *Texas Petrochemicals*, 296 N.L.R.B. at 1062. Thus, there is, as a general matter, "no compelling need" for an employer to conduct polls. *Ibid.* And the Board emphasized that its polling standard does not abridge the right of employees to choose for themselves whether or not to be represented for purposes of collective bargaining. It pointed out that employees always have the "means to rid themselves of an incumbent representative that is no longer supported by the majority (*i.e.*, a decertification election upon a petition * * * supported by at least 30 percent of the unit employees)." *Id.* at 1062.

b. Petitioner contends (Pet. 7-8) that a higher standard should apply to withdrawals of recognition than to RM petitions and employer polls, and that it is therefore irrational for the Board to apply the same standard to each. Petitioner suggests (Pet. 10) that the Board makes it impossible to use polling exactly when such polling would be useful to an employer, *viz.*, when there is substantial doubt, but not necessarily conclusive proof, of the union's loss of majority support.

As the Board has pointed out, however, an employer could well find polling useful even when it possessed a

good-faith reasonable doubt about the union's majority support, and could therefore theoretically proceed to withdraw recognition of the union without a poll. The poll allows the employer "to obtain more certain, precise information about the union's support than is provided by its own reasonable doubt." *Texas Petrochemicals*, 296 N.L.R.B. at 1063. The results of a poll, if favorable to the employer, would more definitively resolve the question of the union's continued majority status, and would therefore enable the employer to "act with confidence and certainty in light of the results of the poll." *Ibid.*[2]

Nor is there merit to petitioner's further contention (Pet. 8-9) that the statutory goal of "promot[ing] industrial and workplace stability in collective-bargaining relationships" (*Texas Petrochemicals*, 296 N.L.R.B. at 1061) is inapplicable where, as here, the employer seeking to conduct the poll is a successor with no established bargaining relationship with the employees' representative. In a successorship situation, there is an "unsettling transition period" between predecessor and successor employers, during which time "the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor." *Fall River Dyeing*, 482 U.S. at 39. Accordingly, in that situation, no less than in a non-successorship case, the Board acts consistently with the statute's goal of promoting stability in bargaining relationships by applying the same standard for

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[2] Indeed, in this case, petitioner informed the Union that it was conducting the poll "[i]n order to avoid possible protracted and unproductive dispute over [the] issue" of the Union's continued support. Pet. App. 43.

polling, by means of which the employer seeks to rebut the union's presumption of majority status and thus to terminate the bargaining relationship.[3]

2. Petitioner correctly points out (Pet. 10-15) that three other courts of appeals have rejected the Board's polling standard. See *Mingtree Restaurant, Inc.* v. *NLRB*, 736 F.2d 1295 (9th Cir. 1984); *Thomas Indus., Inc.* v. *NLRB*, 687 F.2d 863 (6th Cir. 1982); *NLRB* v. *A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981). Despite the conflict in the circuits, further review of the issue is not warranted in this case, for petitioner's poll was unlawful even under the less stringent polling standard adopted by the courts that have rejected the Board's rule.

a. In *A.W. Thompson*, the Fifth Circuit held (insofar as relevant here) that "when an employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere, it may * * * poll the employees for their union sentiment if there is other substantial, objective evidence of a loss of union support (even if that evidence is not sufficient by itself to justify withdrawal [of recognition])." 651 F.2d at 1145 (internal quotation marks and footnote

[3] Petitioner errs in suggesting (Pet. 8 n.6) that the Board's judgment that RM elections and employer polls should be governed by the same standard is not entitled to deference because "the standard for RM elections is immune from judicial review." That standard, like any other Board rule, is subject to review by the courts for rationality and consistency with the Act. Petitioner's reliance on *AFL* v. *NLRB*, 308 U.S. 401 (1940), is misplaced. There, the Court held only that a decision by the Board to certify a union in a representation proceeding pursuant to Section 9 of the Act, 29 U.S.C. 159, is not a "final order of the Board" in an unfair labor practice proceeding for purposes of immediate review by the court of appeals under Section 10(f), 29 U.S.C. 160(f). 308 U.S. at 404-412.

omitted). The court ruled in that case that the employer's poll was unlawful because it had engaged in repeated unfair labor practices, and that, in any event, the employer's evidence as to the union's alleged loss of support was not probative of employee sentiment. *Ibid.* In *Thomas Industries*, the Sixth Circuit, following *A.W. Thompson*, held that "an employer may poll its employees to determine their union sentiment if it has substantial, objective evidence of a loss of union support, even if that evidence is insufficient in itself to justify withdrawal." 687 F.2d at 867. The court concluded in that case that the employer's poll was lawful, citing as "the key factor" evidence that, in the ten-month period preceding the poll, the number of employees who authorized the employer to deduct union dues from their paychecks had declined from 63% to 31% of the bargaining unit. *Id.* at 868. Finally, in *Mingtree Restaurant*, the Ninth Circuit also adopted the "substantial loss of support" standard for polling. 736 F.2d at 1299. The court remanded the case to the Board for a determination of whether the poll was lawful under the court's test. *Ibid.*

b. Petitioner's poll was unlawful even under the polling standard adopted by the Fifth, Sixth, and Ninth Circuits. The court below found, in agreement with the Board, that, prior to conducting the poll, petitioner had reason to believe that, at most, 20% of the employees in the bargaining unit no longer wished to be represented by the Union. Pet. App. 9-12. As the Board concluded (*id.* at 26 n.9), none of the courts that have rejected the Board's polling standard would have found such a meager evidentiary showing to constitute a "substantial loss" of support by the

Union justifying a poll.[4] See also *Wagon Wheel Bowl, Inc.* v. *NLRB*, 47 F.3d 332 (9th Cir. 1995) (upholding Board's conclusion that employer poll was unlawful under more lenient standard, since employees had made only "general statements" of dissatisfaction with their union). Because application of the more lenient "substantial loss" of support polling standard would not affect the outcome, this case is not an appropriate vehicle for the Court to decide whether the Board's polling standard represents a reasonable construction of the Act.[5]

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[4] Although petitioner suggests that it had a reasonable basis for believing, prior to conducting the poll, that more than seven of the 32 employees in the bargaining unit no longer desired Union representation (*e.g.*, Pet. 3), the Board's contrary factual finding, which was sustained by the court as supported by substantial evidence, raises no issue warranting further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Petitioner also suggests (Pet. 13) that, even if its poll was unlawful, the Board, as a remedy, should have ordered an election, rather than issuing a bargaining order. As the court of appeals concluded, however, petitioner is jurisdictionally barred by Section 10(e) of the Act, 29 U.S.C. 160(e), from challenging the Board's remedy in the courts, because petitioner failed to raise its objection before the Board. Pet. App. 12-13. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). In any event, petitioner's claim is without merit, for "an affirmative bargaining order is the standard Board remedy" where, as here, the employer has unlawfully refused to recognize and bargain with the union. Pet. App. 27 n.12; see *Williams Enterprises, Inc.*, 312 N.L.R.B. 937 (1993), enforced, 50 F.3d 1280 (4th Cir. 1995); *Caterair International*, 322 N.L.R.B. No. 11 (Aug. 27, 1996).

[5] Petitioner notes (Pet. 14-15) that two Justices have expressed doubt about the Board's standard for polling. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 797 (1990) (Rehnquist, C.J., concurring); *id.* at 799-800 & n.3 (Blackmun, J., dissenting). The issue before the Court in *Curtin Matheson* was not polling, but rather, whether striker replacements should be presumed to oppose the incumbent union, thus justifying the employer's withdrawal of recognition. Because polling was not involved in *Curtin Matheson*, the Board's brief to the Court did not address the validity of the Board's polling standard.

3. The issue presented by the petition may soon lack continuing significance. In a case now pending before the Board, the General Counsel of the Board has argued that the Board should abandon its current "reasonable doubt" standard as it relates to withdrawals of recognition from certified unions, and should adopt new rules governing withdrawals of recognition from, and polling of employees represented by, such unions. Specifically, the General Counsel has urged the Board to adopt a rule that an employer may not withdraw recognition from a certified union unless a majority of the employees reject union representation in a secret ballot election, to be conducted upon a 30% showing of interest, and that an employer's good-faith doubt about loss of majority status, unconfirmed by election results, is insufficient to justify withdrawal of recognition from a certified union. The General Counsel has also asked the Board to rule that an employer would be permitted to conduct a poll, for the purpose of establishing a basis for securing a secret ballot election, if the employer had objective reason to believe that at least 30% of the employees in the bargaining unit no longer desired union representation. See General Counsel's Exceptions and Brief at 8-13, *Chelsea Industries, Inc.*,

No. 7-CA-36846 *et al.*[6] Because the General Counsel's submission in *Chelsea Industries*, if accepted by the Board, could render the issue in this case academic, further review of the issue in this case is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

JANUARY 1997

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[6] We have provided petitioner with a copy of the General Counsel's brief in *Chelsea Industries* and have also lodged a copy of that brief with the Clerk of this Court.

(5)

No. 96-795

In The

Supreme Court of the United States

October Term, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF OF PETITIONER

EARLE K. SHAWE*
STEPHEN D. SHAWE
ERIC HEMMENDINGER
ELIZABETH TORPHY-DONZELLA
SHAWE & ROSENTHAL
Sun Life Building
20 S. Charles Street
Baltimore, MD 21201
(410) 752-1040

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. THE NLRB'S POLLING STANDARD IS NOT ENTITLED TO DEFERENCE.

In its opposition to Allentown Mack's Petition, the United States argues first that review is not warranted because the Board's polling standard is entitled to deference as a rational interpretation of the Act. (Opp. Cert. 8, 9.) The United States further argues that the standard is long-standing, *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974), and was recently reexamined and reaffirmed by the Board in *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989), *enf'd in part*, 923 F.2d 398 (5th Cir. 1991).

In fact, the Board's standard is both illogical and substantially discredited. As the Board itself acknowledges, it is better for employers to act on the basis of secret ballot polls (Board or employer-sponsored) than to act unilaterally based on information received from employees.[1] Yet the Board makes it impossible for an employer to conduct a poll (or petition for an election) unless the employer already has sufficient evidence to permit it to withdraw recognition.

Moreover, the Board's standard is inconsistent. The Board permits polling when there is no incumbent union. *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967). Clearly, the Board finds nothing wrong with polling, *per*

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[1] As the Lodging of the United States demonstrates, the NLRB General Counsel has impliedly conceded in another forum that the Board's present rule is wrong. (*Chelsea Industries, Inc.*, 7-CA-36846, 7-CA-37106, Lodging at 8-13.)

se. It restricts polling only when a union might be harmed by the results.

The Board's standard is substantially discredited. It is unenforceable in three circuits, the Fifth, Sixth and Ninth.[2] The lone circuit to defer to the Board with respect to this standard – the D.C. Circuit in this case – was itself divided. Additionally, the standard has been questioned by two Supreme Court justices in dictum. *NLRB v. Curtin Matheson Scientific Inc.*, 494 U.S. 775 (1990) (C.J. Rehnquist, concurring and J. Blackmun, dissenting).

II. THIS CASE PROVIDES AN APPROPRIATE VEHICLE FOR THE COURT TO RESOLVE THE CIRCUIT SPLIT ON THIS IMPORTANT QUESTION OF FEDERAL LABOR LAW.

The United States argues that "further review is not warranted in this case, for petitioner's poll was unlawful even under the less stringent polling standard adopted by the courts that have rejected the Board's rule." (Opp. Cert. 12.) The United States' argument should be rejected for two reasons:

First, Allentown Mack's evidence has never been considered under the more lenient standard adopted by three circuits. The D.C. Circuit panel majority affirmed

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[2] The Fifth Circuit refused to defer to the Board's reexamined polling standard. *Texas Petrochemicals v. NLRB*, 923 F.2d 298, 402 (5th Cir. 1991). Instead the court adhered to its own precedent. *NLRB v. A.W. Thomas, Inc.*, 651 F.2d 1141 (5th Cir. 1981).

the Board's findings of fact based on the Board's standard. (App. 9.) It made no pretense of an alternative finding based on the less stringent standard applied by other circuits. If the panel majority would have found the poll unlawful under either standard, then it need not have ruled on whether the Board's polling standard was correct (and, in doing so, created a split in the circuits). *See Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1175 n.1 (3d Cir. 1989) (holding that there was no need to choose between the Board's and the court's standards because the employer's action was unlawful under either).

Nor did the Administrative Law Judge consider the evidence under that standard. The ALJ only observed, in a footnote, "I likewise doubt that it [the evidence] would satisfy the somewhat lesser standard utilized as a prerequisite for a lawful employee poll by three Federal Circuit courts that have rejected the Board's standard." (App. 53, n. 7.) The ALJ, however, made no effort to apply that standard. Instead, he wrote, "As this standard is not the standard used by the Board, and as I am bound to follow Board law, the evidence will not be further discussed in relation to the courts' standard." (*Id.*)

While the Board, also in a footnote, attempted to elevate the ALJ's acknowledged refusal to apply the courts' standard into an alternative finding, the Board treated the head count, rather than the totality of the evidence, as determinative. (*Id.* at 26, n. 9.) Moreover, it refused to count statements that, under any plausible standard for determining good faith doubt, should have been counted as giving rise to such doubt. For example, the board found that Dennis Marsh's statement that he was not being represented for the $35 per month in union

dues he was paying "seems more an expression of a desire for better representation than one for no representation at all." (*Id.* at 50-51.)

Second unlike the current Board standard for employer polling, the standard applied by the Fifth, Sixth and Ninth Circuits does not boil down to a head-count, in which an employee is grudgingly counted only if there is no excuse to question or discredit the reliability of the employee's statement. Nor does it define any particular level of loss of support as "substantial." *See, eg., Texas Petrochemicals v. NLRB*, 923 F.2d 398, 402 (5th Cir. 1991). Rather, "the cumulative effect of all of the evidence must be considered." *Thomas Indus. v. NLRB*, 687 F.2d 863, 868 (6th Cir. 1982).

In this case, only Judge Sentelle, in his dissent, considered the cumulative effect of all of the evidence in light of the other courts of appeals' standard. As he found, the new company's bargaining unit contained only 32 of the 45 employees previously employed by Mack Truck. Seven of them made statements that even the Board counted as opposition to the Union. In addition to these seven, there were the following:

One employee (Marsh) said he was not being represented for the $35 he was paying in monthly union dues. The Board, contrary to common sense, found that this "seems more an expression of a desire for better representation than one for no representation at all." (App. 51.)

One employee (Ridgick) was discounted because he stated his opposition to the Union in a job interview (*Id.*

at 48), even though other statements made in job interviews were counted. (See discussion of McKilvie, Solt, Frank, Murphy, Bloch, and Baker (*Id.* at 50-52).)

One employee (Wehr) was not counted because he quit on June 23, 1991, two days before the Company sent its January 25, 1991 letter to the Union. The employee who apparently replaced him (Zoltack) said the Union was a waste of $35 (the amount of dues). He was not counted because he was hired after January 25, 1991, even though he was employed at the time of the poll. (*Id.* at 49, 51.)

An employee on the night shift (Bloch) stated that the entire night shift (five or six employees) did not want the Union. (*Id.* at 51.)

Most importantly, Mohr, the shop steward in the service department, the larger of the two departments in the bargaining unit, and a member of the Union's bargaining committee, told the Company, "with a new company, if a vote was taken, the Union would lose and it was his feeling that the employees did not want a union." (*Id.* at 53.)

Whether or not the foregoing evidence constitutes conclusive proof that the Union had lost majority support is not the question. The question, under the standard developed by three courts of appeals, is whether the evidence was sufficient to permit further inquiry, in the form of a non-coercive, secret-ballot, preannounced, poll. That issue was not addressed by the ALJ, Board or Court of Appeals in this case. If the other circuits' standard were applied, it would be difficult to reach any conclusion other than that the evidence did generate a reasonable doubt, sufficient to warrant a poll.

III. CERTIORARI SHOULD NOT BE DENIED BASED ON THE *CHELSEA INDUSTRIES* CASE PENDING BEFORE THE BOARD.

The United States concludes with the argument that certiorari should be denied because the issue presented would become moot if the Board alters its rules concerning withdrawal of recognition and Board-conducted elections, in the manner suggested by the Board's General Counsel in a pending case. *Chelsea Industries, Inc.*, 7-CA-36846, 7-CA-37106. The United States has lodged with the Supreme Court the General Counsel's Brief, filed October 23, 1995. This highly speculative argument should be rejected for several reasons.

First, it is wrong to argue that *certiorari* is improper when a litigant – what the General Counsel is in *Chelsea* – in an unrelated case has asked an agency to change a rule. To accept this argument would be to permit the United States, on behalf of the Board, to evade Supreme Court review simply by citing a litigant's argument urging the Board to reconsider a controversial rule. (In this case some 15 months have passed since the General Counsel filed his brief in *Chelsea*, and it goes without saying that the Board might well never adopt the rule.) It also would be improper to permit the United States, on behalf of the Board, to advocate a position that is contrary to one that the Board adopted elsewhere (i.e. arguing in this forum that the NLRB's rule is a rational interpretation of the Act and arguing to the Board in another context that this rule should be changed). At minimum, the General Counsel should not be allowed to evade *certiorari* merely because he has advocated contradictory positions.

Second, the General Counsel's recommendation in *Chelsea* that the Board overrule the *Celanese* good-faith doubt standard has been repeatedly advocated and rejected. In *NLRB v. Curtin Matheson, supra*, the AFL-CIO filed a brief *amicus curiae* on behalf of the Board in which it urged the Court to reject the "good faith doubt" standard. *See Brief Amicus Curiae of the AFL-CIO Supporting Petitioner in NLRB v. Curtin Matheson Scientific, Inc.*, at 1 ("we argue that this Court's recent decisions and their rationale show that the *Celanese* rule simply cannot bear scrutiny") (on file with the Court). The Court did not follow the AFL-CIO's recommendation. More pertinent to the United States' argument in this case, in *Auciello Iron Works, Inc. v. NLRB*, ___ U.S. ___, 116 S.Ct. 1754 (1996), the AFL-CIO opposed certiorari on the grounds that its recommendation that *Celanese* be overruled was then pending in a case before the NLRB. *See Transcript of Oral Argument in Auciello Iron Works v. NLRB*, 1996 WL 204131 at *8-9 (April 22, 1996) ("the AFL-CIO takes the position that the pendency of *Lee Lumber* renders the grant of cert improvident.") This Court nonetheless granted *certiorari*.

In fact, in the case to which the AFL-CIO referred in its *Auciello* brief (*Lee Lumber and Building Material Corp.*, 322 N.L.R.B. No. 14, 153 L.R.R.M. (BNA) 1159 (1996)), the NLRB declined to accept the suggestion of both the NLRB General Counsel and *amicus* AFL-CIO that the Board use the case as a vehicle to overrule *Celanese*, 153 L.R.R.M. at 1161 n.14. There is no reason to believe that the Board will take a different position on the General Counsel's recommendation in *Chelsea*. In any event, review should not be denied on the strength of what appears to be not

much more than a trial balloon floated by the Board's General Counsel.[3]

Finally, the issue in *Chelsea* is whether an employer can unilaterally withdraw recognition at the end of the certification year, based on a petition containing the signatures of a majority of workers. There was no poll. The Union's claim for bargaining rights at Allentown Mack, by contrast, was based solely on the rebuttable presumption of continuing majority support after an asset sale. When the employees had the opportunity to participate in an election (the poll conducted by the clergyman) they rejected union representation.

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[3] It is also noteworthy that when the Board was reconsidering its rules with respect to bargaining orders in *Lee Lumber* and another case, *Caterair Int'l*, 322 N.L.R.B. No. 11, 153 L.R.R.M. (BNA) 1153 (1996), it held oral argument and invited public comment. No oral argument has been held, or public input sought, in *Chelsea*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EARLE K. SHAWE*
STEPHEN D. SHAWE
ERIC HEMMENDINGER
ELIZABETH TORPHY-DONZELLA
SHAWE & ROSENTHAL
Sun Life Building
20 S. Charles Street
Baltimore, MD 21201
(410) 752-1040

* *Counsel of Record*

February, 1997

(4)

No. 96-795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

Of Counsel:
STEPHEN A. BOKAT
MONA C. ZEIBERG
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Dated: December 1996

JOHN S. IRVING
Counsel of Record
R. ALEXANDER ACOSTA
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Counsel for the Chamber of Commerce of the United States of America

26pp

QUESTION PRESENTED

Is an employer prohibited from conducting a secret-ballot, non-coercive poll of its employees to determine whether a majority of them support an incumbent union unless that employer already has obtained so much evidence of lack of majority support as to render the poll superfluous?

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IN THE

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ALLENTOWN MACK SALES AND SERVICE, INC.,
Petitioner,

v.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents

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[1] This brief *amicus curiae* is being filed with the written consent of both Petitioner and Respondent. As required by United States Supreme Court Rule 37.2, letters evidencing such consent are being simultaneously filed with the Clerk of the Court.

nearly 215,000 businesses and professional organizations and serves as the principal voice of the American business community.

An important function of the Chamber is to represent the interest of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. The Chamber has sought to advance those interests in this Court by filing briefs *amicus curiae* in cases of importance to the business community.[2]

In the present case, a divided panel of the Court of Appeals for the District of Columbia Circuit affirmed a National Labor Relations Board ("NLRB" or "the Board") holding, which precludes an employer from polling its employees to determine whether a majority of them support an incumbent union unless the employer already has obtained so much evidence of lack of majority support as to render the poll superfluous. This holding conflicts with the decisions of other circuits, all of which have rejected the NLRB's standard on the ground that it makes no sense. The NLRB's standard, moreover, renders it nearly impossible for an employer to challenge a union's presumption of majority employee support. The Chamber's members have a vital interest in defending their right to rebut this presumption and in clarifying this now confused area of law.

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[2] *See, e.g., Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992); *Patterson v. Shumate*, 505 U.S. 1239 (1992); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990).

STATEMENT OF THE CASE

Petitioner Allentown Mack Sales, Inc., ("Allentown Mack") is a company that was formed by three former managers of the Mack Truck dealership in Allentown, Pennsylvania. App. 2. On December 21, 1990, Allentown Mack purchased the dealership from Mack Trucks, Inc., and hired 32 of the dealership's 45 employees. *Id.* All of these 32 employees had been represented by a union. *Id.*

During the period leading up to, and immediately after the sale, seven employees made unequivocal statements that they no longer supported the union. One of these seven told management that the "entire night shift" (consisting of five or six employees) did not want the union. App. 2, 52. Another employee, who was a union shop steward, told management that the employees did not need a union. App. 14. Still another employee, who was a member of the union bargaining committee and the shop steward for the service department (consisting of 23 employees), also told management that "with a new company, if a vote was taken, the union would lose and that it was his feeling that the employees did not want a union." *Id.*

Based on these employee sentiments, the new company postponed recognition of the union "until further investigation." App. 30. It then polled its employees to determine whether a majority of them supported the union. App. 44, 58. The poll was supervised by a Roman Catholic priest and was not coercive. App. 2, 58-60.

In the poll, the employees rejected the union by a 19-to-13 margin. App. 2, 14, 44. Accordingly, the company withheld recognition from the union. App. 2. The union then filed unfair labor practices charges with the Board. *Id.*

The Board held that the poll violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "the Act"). App. 26 n. 9. Under NLRB precedent, the Board explained, an employer may not poll its employees to determine whether they support their union unless the employer has a good-faith doubt of the union's majority status. App. 25-26. To satisfy this good-faith doubt test, however, the employer must show evidence that a majority of employees expressly repudiated the union. App. 24-26. Because a majority of Allentown's employees had not individually told management that they opposed the union, the Board found that Allentown Mack lacked a good-faith doubt. *Id.* The Board further found that "because the poll itself was an unfair labor practice, [the employer] could not lawfully rely on the results of the poll in declining to recognize the [u]nion." App. 27. Accordingly, the Board held that Allentown Mack's withdrawal of recognition was also unlawful and ordered the company to bargain with the union even though a majority of employees had expressly voted against a union.

A divided panel of the Court of Appeals for the District of Columbia enforced the Board's order. The panel expressly rejected the decisions of other courts of appeals, all of which have rejected the Board's standard and instead have adopted a rule that allows an employer to poll its employees to test majority status if it has substantial, objective evidence of a loss of union support even if that evidence does not establish that an actual majority of the employees no longer support the union.

SUMMARY OF THE ARGUMENT

This case raises a distinct legal issue -- when may an employer conduct a non-coercive poll of its employees to determine whether it should no longer recognize an

incumbent union on the ground that a majority of its employees no longer desire representation by that union.

The NLRB has adopted a standard that permits a poll only when the employer already has so much other evidence of lack of majority support as to justify a withdrawal of recognition without a poll. This standard, however, makes no sense. By permitting a poll only when the employer already has so much evidence of lack of majority support as to justify a withdrawal of recognition, the Board's standard essentially permits that employer to conduct a poll only when it has no actual need to do so.

The Board's standard also lacks a statutory basis. The Board found that the poll violated Section 8(a)(1) of the NLRA, which prohibits employer interference with employees' exercise of their right to organize. All parties concede, however, that the poll was non-coercive and did not impinge on any employee right. The reasons given by the Board for holding the poll unlawful have no basis in Section 8(a)(1) of the NLRA.

The decision below has created a conflict among the federal courts of appeals. While the Court of Appeals below upheld the Board's standard, the Courts of Appeals for the Fifth, Sixth and Ninth Circuits have explicitly rejected the rule on the ground that it does not make any sense. The Court of Appeals for the Second Circuit has also found the standard to be "problematic." This circuit split has continued despite the Board's attempt to reconsider and re-rationalize the basis for its standard.

The issues raised in this petition significantly affect important labor rights of employers and employees. A poll provides what may be the only means by which an employer can meet the strict standard necessary to warrant withdrawing recognition from a union. By precluding the employer,

particularly a new successor employer, from polling its employees unless it has already met this standard, the Board has severely restricted an employer's right to rebut the union's presumption of majority support. This anomaly has caused the Chief Justice to express "considerable doubt" about the standard and has also caused Justice Blackmun to state that he is "troubled by" the standard.

This petition thus presents a clear issue of federal labor law that was wrongly decided by the Court of Appeals, that is the subject of a circuit split and that is of vital importance to employers and employees alike. For these reasons, the petition for *certiorari* should be granted.

ARGUMENT

I. THE CASE BELOW WAS WRONGLY DECIDED.

A. The NLRB Standard, Which Permits A Poll Only When That Poll Would Be Entirely Superfluous, Makes No Sense.

This case raises an important question of federal law: when may an employer poll its employees to determine whether a majority of them support an established union. A union, it is well settled, typically enjoys an irrebuttable presumption of majority support for the year following the union's certification and for the first three years of a collective bargaining agreement. *Auciello Iron Works, Inc. v. NLRB*, 116 S. Ct. 1754, 1758 (1996); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 777-78 (1990). At the end of the certification year or upon the expiration of the collective-bargaining agreement, however, this presumption becomes rebuttable. *Id.* An employer may then overcome the presumption by showing that either "(1) the union did not in fact enjoy majority support, or (2) the employer had a

'good-faith' doubt, founded on a sufficient objective basis, of the union's majority support." *Curtin Matheson*, 494 U.S. at 778. As soon as an employer has a good-faith doubt of the union's majority support, it should withdraw recognition. *See Auciello*, 116 S. Ct. at 1754. Indeed, it is an unfair labor practice for an employer to confer exclusive representation status upon a union that enjoys only minority employee support. *See International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731, 736 (1961); 159 U.S.C. § 8(a)(2).

A poll is a useful method by which an employer can determine whether its employees support the union. The Board has "acknowledge[d] an employer's right to conduct such a poll" and professed a desire not to "do away with such polls." *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1061 (1989), *enf'd in part*, 923 F.2d 398 (5th Cir. 1991). The Board, however, has so narrowed the circumstances under which such polling is permitted as to render polling entirely meaningless. The Board permits such polls only when the employer has a good-faith doubt, founded on a sufficient objective basis, of the union's majority support. *Texas Petrochemicals*, 296 NLRB at 1059. This is the exact same standard that the Board uses for determining whether an employer is justified in withdrawing recognition from a union. *Id.* The Board's standard, which permits the employer to poll to obtain evidence of lack of majority support only if the employer already has so much evidence of lack of support as to make the poll superfluous, is circular and quite divorced from sense or logic.

B. This NLRB Standard Lacks A Statutory Basis.

The Board based its ruling that the poll was unlawful on Section 8(a)(1) of the NLRA. This section declares it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights

guaranteed in section 7." 29 U.S.C. § 158(a)(1). The Board, however, did not find that the poll interfered with any Section 7 right. Indeed, the Administrative Law Judge specifically found that the conduct of the poll was non-coercive and did not interfere in any way with employees' Section 7 rights.[3]

The Board's only basis for holding the poll unlawful is that the employer conducted the poll without satisfying the good-faith doubt requirement, *i.e.*, without knowing that a majority of the employees did not support the union. App. 25-26. The Board has given two reasons for this requirement. *See Texas Petrochemicals Corp.*, 296 NLRB at 1057. The primary reason is a claimed need for consistency between the standard that an employer must meet in order to obtain an NLRB-conducted secret ballot election[4] -- *i.e.*, good-faith doubt of the union's majority support -- and the standard that the employer should meet in order to conduct a poll. *Id.* at 1061-63. The secondary reason is the Board's belief that its restrictive standard fosters industrial stability.

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[3]In *Strucksnes Constr. Co.*, 165 NLRB 1062 (1967), the Board held that a poll does not interfere with employees' Section 7 rights if: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisals are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. The poll in this case satisfied this standard, App. 58, and "there is nothing in the evidence . . . to indicate that there was anything questionable or coercive about the poll." App. 60.

[4]Such an election, which is authorized by Section 9(c) of the Act, is initiated by the employer to test the union's majority support. This election is triggered by an employer "RM" petition, which, like a poll, must be supported by objective evidence of actual loss of majority status. *See Texas Petrochemicals*, 296 NLRB at 1059. Because the Board requires the same level of proof to trigger this election, it is not a viable option for an employer to seek an NLRB election instead of a poll.

Neither of these reasons has any basis in the statute. The first reason -- the claimed need for consistency between the standard for a poll and a Board election -- impermissibly conflates the Board's function as the supervisor of representation elections (Section 9 of the Act) with the Board's function in preventing and adjudicating unfair labor practices (Sections 8 and 10 of the Act). *See American Fed'n of Labor v. NLRB*, 308 U.S. 401 (1940) (discussing these two distinct functions). Section 9 authorizes the Board to set standards governing elections and to set aside those elections if those standards are not met.[5] That conduct violates an election standard, however, does not make it an unfair labor practice.[6] *See, e.g.*, Patrick Hardin, *The Developing Labor*

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[5]The Board's election standards normally are immune from judicial review. *See American Fed'n of Labor*, 308 U.S. at 401. Surely, the Board cannot claim that the polling standard in the present case, which is subject to judicial review, should be upheld merely because it is consistent with an election standard under Section 9 of the Act. Employer pre-election statements, for instance, are separately analyzed under Sections 8 and 9 of the Act and can violate the requirements of one section without violating the other. *See* Patrick Hardin, *The Developing Labor Law* 344 (3rd ed. 1992). Any alleged need for consistency not only lacks a statutory basis, but would also effectively immunize the Board from judicial review in this case and in other cases in which unfair labor practice findings are based on an alleged need for consistency with Section 9 election standards. The Board should not be permitted to avoid its adjudicatory responsibility under Section 8 simply by invoking its Section 9 rules concerning the conduct of elections.

[6]The Board's claimed need for consistency between these two standards also overlooks the significant distinctions between a poll and a Board conducted election. A poll is merely a means of determining whether there is sufficient doubt of majority support to warrant a withdrawal of recognition until such time as the union reestablishes its exclusive majority status. Following such a withdrawal, the union remains free to challenge

(continued...)

Law 98 (3rd ed. 1992) ("[A]n infringement of [one of the Board's Section 9 election standards] is not deemed an unfair labor practice but merely a basis for setting aside the election."). The second reason -- the asserted need for industrial peace -- also does not transform the non-coercive poll into an unfair labor practice. The Board cannot declare any act to be a Section 8(a)(1) violation merely because it believes that doing so would foster industrial peace. Nothing in Section 8 gives the Board such unchecked discretion and power.

In short, the Board's decision is not rational and has no basis in the Act. The panel majority therefore erred by deferring to the Board, *see Curtin Matheson*, 494 U.S. at 787, and by enforcing the Board's decision.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE OTHER CIRCUITS, WHICH HAVE UNIFORMLY REFUSED TO ENFORCE THE NLRB'S STANDARD.

The Board first applied its polling standard in *Montgomery Ward & Co.*, 210 NLRB 717 (1974). Since then, the Courts of Appeals for the Fifth, Sixth and Ninth Circuits have explicitly rejected the rule on the ground that it does not make sense. *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141, 1144 (5th Cir. 1981) ("[W]e are not convinced that an employer may conduct an employee poll only when

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[6](...continued)
the employer's action and to obtain an NLRB election. Unlike a poll, an election is conclusive. It requires the participation of the NLRB and carries the imprimatur of the NLRB's certification and a one year irrebuttable presumption of majority status, or if the union loses the election, a statutory bar to another election for one year. There is thus a rational basis for a higher standard for triggering the formality of an NLRB election.

it has no actual need to so, that is, when it already has sufficient objective evidence to justify withdrawal of recognition."); *Thomas Indus., Inc. v. NLRB*, 687 F.2d 863, 867 (6th Cir. 1982) ("We find the Board's position to be untenable [because under] the Board's analysis, an employer would only be allowed to take a poll under circumstances where no poll was necessary . . . ."); *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984) ("[We disagree with the Board because by] the Board's reasoning, an employer in doubt of the union's majority status would be allowed to take a poll only when it had no actual need to do so . . . ."). These circuits have instead adopted a "loss of support" rule, which permits a poll so long as the employer has "substantial, objective evidence of a loss of union support, even if that evidence is insufficient in itself to justify withdrawal." *Thomas Indus.*, 687 F.2d at 867.

In light of these courts' objections, the Board reconsidered its standard in 1989. *See Texas Petrochemicals*, 296 NLRB at 1057. It decided to reaffirm its standard for the same reasons it previously cited in *Montgomery Ward*. *Texas Petrochemicals* thus did nothing to address these circuits' concern that the Board's standard did not make sense.

Since *Texas Petrochemicals*, the Courts of Appeals for the Fifth and Ninth Circuits have reaffirmed their belief that the Board's standard is incorrect. *See Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398, 402 (5th Cir. 1991) ("This circuit . . . feels that there is a lesser burden for an employer to justify holding a poll."); *Wagon Wheel Bowl, Inc. v. NLRB*, 47 F.3d 332, 335 (9th Cir. 1995) (the *Texas Petrochemicals* standard is not applicable in this circuit). The Court of Appeals for the Second Circuit has also expressed serious doubts concerning the *Texas Petrochemicals* standard. *See NLRB v. Albany Steel, Inc.*, 17 F.3d 564, 571 (2d Cir. 1994). Moreover, the Chief Justice and Justice Blackmun,

respectively, have also expressed "considerable doubt" about and have been "troubled by" the *Texas Petrochemicals* standard. *See Curtin Matheson*, 494 U.S. at 797 (Rehnquist, C.J., concurring) and at 799 (Blackmun, J., dissenting).

In this case, the divided panel below rejected these authorities and instead upheld the Board's standard. App. 8 ("As between the decision of the three courts of appeals and the board, we believe the Board has the better of it."). Although the panel found that the Board's analysis was "[not] entirely satisfactory," it nonetheless concluded that "the only proper course [was] . . . to defer to the Board." App. 6, 8. This decision, thus, has created a circuit conflict, which alone justifies this Court's granting *certiorari*. But, this case presents more than mere circuit conflict. The question of when an employer may poll its employees raises important issues of federal law.

III. THIS PETITION RAISES IMPORTANT QUESTIONS OF FEDERAL LABOR LAW THAT SIGNIFICANTLY AFFECT VITAL INTERESTS OF EMPLOYERS AND EMPLOYEES.

A. Polling Is Important Because It "May Be The Only Effective Means" By Which An Employer Can Obtain The Evidence Necessary To Rebut The Union's Presumption Of Majority Support.

An employer whose employees have expressed a desire to repudiate their union has a right to attempt to rebut the union's presumption of majority support. *Curtin Matheson*, 494 U.S. at 778. To establish the good-faith doubt of majority support needed to overcome this presumption, the employer must show that a majority of its employees expressed a specific desire to repudiate the union. Anti-union sentiments expressed during a job interview, employee

statements of dissatisfaction with the quality of union representation, or one employee's report of other employees' union antipathy is typically insufficient. App. 10-11. Rather, under the Board's standard, the employer must show that a majority of its employees of their own accord expressed to the employer a specific desire to repudiate the union. *Id.*

The quantum of proof that the Board requires to satisfy the good-faith doubt standard is so stringent as to make it nearly impossible for an employer to rebut the presumption of continued majority status unless the employer can take a poll.[7] While some employees may actively seek out the employer in order to express a specific desire to repudiate the union, it is highly unlikely, especially among the larger

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[7]The Board continues to recognize that an employer may overcome a union's presumption of majority support by showing that either "(1) the union did not in fact enjoy majority support, or (2) the employer had a 'good-faith' doubt, founded on a sufficient objective basis, of the union's majority support." *Curtin Matheson*, 494 U.S. at 778; *Celanese Corp. of Am.*, 95 NLRB 664, 673 (1951). By defining good-faith doubt so strictly, however, the Board has effectively eliminated the distinction between good-faith doubt and knowledge in fact. *See, e.g., Phoenix Pipe & Tube*, 302 NLRB 122, 122 (finding of lack of good-faith doubt based "solely on the fact that . . . the statements of 24 employees . . . do not constitute a majority . . . ."), *enf'd*, 955 F.2d 852 (3d Cir. 1991); *Guerdon Indus., Inc.*, 218 NLRB 658 (1975) (dissenting opinion) (burden on an employer is so heavy that it must affirmatively prove loss of majority status in fact). After all, if a majority of employees have expressed a specific desire to repudiate the union, does this not constitute knowledge in fact? Indeed, many of the Board's recent decisions have also attempted to limit employers' ability lawfully to withdraw recognition from a union. *See generally Curtin Matheson*, 494 U.S. at 797 (Rehnquist, C.J., concurring) (some recent decisions suggest that the Board has made it even more difficult to satisfy the good-faith doubt requirement); *see, e.g., NLRB v. New Assocs.*, 35 F.3d 828 (3d Cir. 1994) (refusing to enforce a Board decision that held that an employee-initiated decertification petition did not raise a good-faith doubt concerning the union's majority status).

employers, that a majority of the employees will clearly express their sentiments. In such a case, polling can be "a useful and legitimate tool [for ascertaining employees' sentiments] when the employer's sincere doubt of the union's majority status is based on objective evidence which falls short of that needed to justify withdrawal of recognition." *A.W. Thompson*, 651 F.2d at 1145.

The employer's dilemma is made even more difficult by the fact that the Board applies a case-by-case analysis to determine whether there is "sufficient objective basis" to establish good-faith doubt. As a result, the definition of a sufficient objective basis is shifting and difficult to predict with certainty. This case is a perfect example. The NLRB's and ALJ's decisions are full of speculation as to why employees' comments might not indicate loss of support. App. 23-24, 45-56. Permitting a non-coercive poll would provide predictability and reduce drawn-out litigation concerning whether there was a sufficient objective basis to support a good-faith doubt.

The Chief Justice and Justice Blackmun have recognized that the Board's polling standard has severely limited the legitimate means by which an employer might satisfy, with predictability, the good-faith doubt requirement. In *Curtin Matheson*, the Chief Justice expressed "considerable doubt whether the board may insist that good-faith doubt be determined only on the basis of sentiments of individual employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments[, i.e., a poll.]" 494 U.S. at 797 (Rehnquist, C.J., concurring). Justice Blackmun was similarly troubled by the Board's policy, which "appears to require that good-faith doubt be established by express avowals of individual employees [but by prohibiting a poll] make[s] it practically impossible for the employer to amass direct evidence of its

workers' views." *Id.* at 799 (Blackmun, J., dissenting). The Board cannot define good-faith doubt so strictly that it effectively requires proof while simultaneously prohibiting employers from using a poll, which may be the only effective means of obtaining this proof.

B. Having An Effective Means To Determine Employees' Sentiments Regarding A Union Is Especially Important In Light Of The Limited Time That An Employer Has In Which To Ascertain These Sentiments.

An employer whose employees have expressed a desire to repudiate the union must investigate their sentiments in a timely manner. *See Auciello Iron Works*, 116 S. Ct. at 1754. Just last term, this Court emphasized that once the employer and the union agree to a collective-bargaining agreement, the presumption becomes irrebuttable for up to three years. *Id.* But by forbidding a poll, the Board has made it exceedingly difficult for an employer to establish a good-faith doubt in the limited time available to it. If the Board is going to insist that an employer challenge the union's majority presumption only during contract negotiation periods, then non-coercive polling must be permitted so that an employer that has substantial, objective evidence of a loss of union support, but whose evidence is insufficient to justify a withdrawal of recognition or trigger a Board election, can take steps to determine whether the union has in fact lost majority support.

C. A Realistic Opportunity To Rebut The Presumption Is Especially Important In Cases Such As This One That Concern A Successor Employer.

Although a successor employer, such as Allentown Mack, is bound by the incumbent union's presumption of majority support, the successor employer has a right to attempt to

rebut this presumption. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Harley-Davidson Transp. Co.*, 273 NLRB 1531, 1531 (1985). This opportunity is especially important to successor employers because the new company's employees may feel differently toward the new employer and because the company's workforce may have changed. This case presents a perfect example. While the old employer is a large multi-national company, Allentown Mack is a small, locally-owned enterprise that only employed about two-thirds of the former employer's employees. App. 2. Judge Sentelle, in dissent, thus correctly observed that in cases such as this one the presumption of majority support is weaker and the need for a poll is greater. App. 18.

A successor employer is also often new on the scene. It has not been a party to past collective-bargaining agreements with the union and is in a difficult position precisely because of that lack of knowledge and experience. Under *Auciello*, moreover, this new employer has only a short time to ascertain its employees' sentiments regarding the union. Delay or instability at this point could damage the nascent relationship between the new employer and its employees and could undermine employee moral. For the new employer in particular, a poll may provide the only practicable option for determining employee sentiments. Thus, the petition should also be granted because it raises important questions of federal labor law that significantly affects vital employer and employee rights.

CONCLUSION

For all the reasons stated herein and in the petition for *certiorari*, the petition should be granted.

Respectfully submitted,

JOHN S. IRVING
Counsel of Record
R. ALEXANDER ACOSTA
KIRKLAND & ELLIS
655 Fifteenth Street
Washington, D.C. 20005
(202) 879-5000
Counsel for the
Chamber of Commerce of the
United States of America

Of Counsel:
STEPHEN A. BOKAT
MONA C. ZEIBERG
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062

Dated: December 1996.

(8)

No. 96-795

In The

Supreme Court of the United States

October Term, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

JOINT APPENDIX

WALTER DELLINGER*
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

Counsel for Respondent

EARLE K. SHAWE*
STEPHEN D. SHAWE
ERIC HEMMENDINGER
ELIZABETH TORPHY-DONZELLA
SHAWE & ROSENTHAL
Sun Life Building
20 S. Charles Street
Baltimore, MD 21201
(410) 752-1040

Counsel for Petitioner

*Counsel of Record

Petition For Certiorari Filed November 19, 1996
Certiorari Granted March 3, 1997

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OR CALL COLLECT (402) 342-2831

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CONTENTS OF JOINT APPENDIX*

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* Appended to the Petition for Certiorari are the following: May 21, 1996 Decision of the U.S. Court of Appeals for the District of Columbia Circuit from which this Appeal was taken (Appendix A); April 12, 1995 Decision of the National Labor Relations Board with Decision of Administrative Law Judge appended thereto (Appendix B); September 13, 1996 Orders of the U.S. Court of Appeals for the District of Columbia denying Petitioner's Suggestion for Rehearing En Banc (Appendix C) and Petition for Rehearing (Appendix D); and October 24, 1996 Order of the U.S. Court of Appeals for the District of Columbia Circuit granting Petitioner's Motion for Stay of Mandate (Appendix D).

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In The Matter of: Allentown Mack Sales and Service, Inc.
Board Case No. 4-CA-19516

Date	Document
01/22/91	Charge
02/14/91	First Amended Complaint
03/27/91	Complaint and Notice of Hearing
04/09/01	Answer
10/15/91	Hearing Opened
10/16/91	Hearing Closed
01/24/92	Administrative Law Judge's Decision
02/20/92	Respondent's Exceptions
03/23/92	General Counsel's Cross-Exceptions
03/23/92	Charging Party's Cross-Exceptions
04/12/95	Board's Decision and Order
05/25/95	Petition for Review
06/08/95	Cross-Application for Enforcement
05/21/96	Decision of the Court of Appeals
05/21/96	Judgment of the Court of Appeals
07/01/96	Petition for Rehearing Filed
09/13/96	Petition for Rehearing Denied
09/18/96	Motion to Stay Issuance of Mandate Filed
10/24/96	Motion to Stay Issuance of Mandate Granted
11/19/96	Petition for Writ of Certiorari Filed
03/03/97	Petition for Writ of Certiorari Granted

[p. 1] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:	:	
ALLENTOWN MACK SALES & SERVICE, INC.	:	
and	:	Case No. 4-CA-19516
LOCAL LODGE #724, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO.	:	

The above-entitled matter came on for Hearing, pursuant to Notice, before WALLACE NATIONS, Administrative Law Judge, at 615 Chestnut Street, Courtroom No. 1, Philadelphia, Pennsylvania, on Tuesday, October 15, 1991, commencing at 10:00 a.m.

APPEARANCES:

On Behalf of General Counsel:

RICHARD HELLER, ESQUIRE
National Labor Relations Board
615 Chestnut Street
Philadelphia, PA 19106

On Behalf of Charging Party:

DENNIS P. WALSH, ESQUIRE
Spear, Wilderman, Borish, Endy, Browning & Spear
Suite 1500, Atlantic Building
260 South Broad Street
Philadelphia, PA 19102

On Behalf of the Respondent/Employer:

GEORGE S. FLINT, ESQUIRE
Jackson & Nash
330 Madison Avenue
New York, NY 10017

[p. 2] INDEX

EXHIBITS

[p. 3] PROCEEDINGS

JUDGE NATIONS: This is a formal proceeding before the National Labor Relations Board in the matter of Allentown Mack Sales and Service, Inc. and Local Lodge 724, International Association of Machinists and Aerospace Workers, AFL-CIO. It's Board Case No. 4-CA-19516.

My name is Wallace Nations; I'm the Administrative Law Judge with the Agency assigned to the proceeding.

May I have the appearances of the parties' representatives, beginning first with the counsel for General Counsel.

MR. HELLER: For General Counsel, Richard P. Heller, H-e-l-l-e-r. NLRB, 615 Chestnut Street, 7th Floor, Philadelphia, Pennsylvania 19106.

JUDGE NATIONS: The representation for the Charging Party?

MR. WALSH: Yes. For the Charging Party, Dennis P. Walsh, Esquire, Spear, Wilderman, Borish, Endy, Browning & Spear. 260 South Broad Street, Suite 1500, Philadelphia 19102.

JUDGE NATIONS: And for the Respondent Employer?

MR. FLINT: George S. Flint, Jackson & Nash. 330 Madison Avenue, New York, New York 10017.

* * *

[p. 11] MICHAEL J. WALSH,

a Witness herein, called for examination by counsel for General Counsel, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HELLER:

Q. Mr. Walsh, by whom are you employed?

A. Local 724, the International Association of Machinists and Aerospace Workers.

Q. And what is your job?

A. Business Representative.

Q. How long have you held that position

A. Since 10/1/89.

Q. Can you generally describe your duties and responsibilities?

A. Generally, I negotiate Collective Bargaining Agreements, process grievances, arbitrations, and generally represent the members of Local 724.

Q. Did the Union represent employees of Mack Trucks, Inc. at its facility at Routes 309 and 22 in Allentown, Pennsylvania?

[p. 12] A. Yes, they did.

Q. During what time period?

A. Local 724 started to represent them around 1973.

* * *

[p. 23] Q. Since Allentown Mack began operating, do you know whether any of its employees have paid dues to the Union?

A. Yes, they have.

Q. Approximately how many, if you know?

A. Approximately 23.

Q. And were those individuals who were part of the bargaining unit at Mack?

A. Yes, they were.

* * *

[p. 24] Q. The 23 employees who have paid dues to the Union, are they currently paying dues to the Union, all 23?

[p. 25] A. Yes, they are.

* * *

[p. 33] JOHN HORAN,

a Witness herein, called for examination by counsel for General Counsel, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HELLER:

Q. Could you spell your last name, please, for the [p. 34] record?

A. H-o-r-a-n.

Q. Are you testifying pursuant to a subpoena today?

A. Yes, I am.

Q. Who do you work for?

A. Allentown Mack Sales and Service.

Q. Where?

A. In Allentown.

Q. Okay. Could you give the address, please?

A. 1407 Bulldog Drive.

Q. And do you know what route that's on?

A. At 22 and 309, roughly.

Q. How long have you worked for Allentown Mack?

A. Less than a year.

Q. When did you start?

A. In January of 1991.

Q. And who was your previous employer?

A. Mack Trucks, Incorporated.

Q. Where?

A. Same location.

Q. How long did you work for Mack Trucks, Incorporated?

A. A little under 27 years; 26 years, ten months.

Q. And what is your current job title?

A. I'm a lead man mechanic in the unit rebuild room.

* * *

[p. 37] Q. Which one is your immediate supervisor?

A. Roy Christ is my immediate supervisor.

Q. To your knowledge, who are Allentown Mack's other supervisors and management officials?

A. David Worth is a service manager, Rick Walsh is office manager, Mr. Dwyer is the owner, and James Hamershock is the parts manager.

Q. Okay. Which of those individuals were supervisors or officials of Mack Trucks?

A. All but James Hamershock.

Q. Do you know what positions they held with Mack Trucks?

A. Mr. Dwyer was branch manager, David Worth was service manager, Rick Walsh was office manager.

* * *

[p. 61] RONALD MOHR,

a Witness herein, called for examination by counsel for General Counsel, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HELLER:

Q. Can you please state your name and spell your last name for the record?

A. Ronald Mohr, M-o-h-r.

Q. Mr. Mohr, are you testifying pursuant to a subpoena?

A. Yes.

Q. Who do you work for?

A. Allentown Mack.

Q. How long have you worked for them?

A. Since January.

Q. Of what year?

A. '91.

Q. And who did you work for previously?

A. Mack Trucks, Allentown Branch.

Q. For how long?

[p. 62] A. Twenty-two years.

Q. What is your current job title?

A. Classified A mechanic.

Q. What was it for Mack Trucks?

A. Classified A mechanic.

* * *

[p. 64] Q. What process did you go through to be hired by Allentown Mack?

A. I was called in to Dave Worth's office, and he told me what he had to offer, and he told me it would be a non-union shop. And then he asked me – told me the wages and all that and asked me if I wanted the job.

[p. 65] Q. And how did you respond?

A. I said: Yes. I said: I'll work for you.

Q. Okay. Was that when you were hired?

A. Yes, I would think –

Q. Was there any other part of the process to get hired or was that it?

A. No.

Q. Have you had any discussions with Robert Dwyer regarding the Union?

A. Yes.

Q. When?

A. I'm not sure of the day. It was in December, I would say.

Q. Of what year?

A. '90.

Q. And where did the conversation take place?

A. Up in Bob Dwyer's office.

Q. Who else was present, if anyone?

A. I don't recall. It was just me and Bob.

Q. And how did the – how did the conversation get started?

A. He asked me how things were going in the shop.

Q. Before that, how did you come to be in his office?

A. They called me from the service desk.

Q. Okay.

[p. 66] A. I was on the floor and they told me to go up to Bob Dwyer's office.

Q. Okay. And now tell about the conversation.

A. And then when I got up there, we sat down and he asked me how things are going out in the shop. So I told him all right. And he asked me about the Union.

Q. What did he say? How did he ask?

A. He asked me how I felt about the Union. I told him I could work with the Union or I could work without the Union; I'm there to do my job.

Q. And how did he respond to that?

A. Well, he came and he said he would work either way, with the Union or without. You know, he could work – it would be up to the men.

Q. And did he ask any other questions?

A. No.

Q. Okay. Did he ask about any other employees?

A. I told him I couldn't –

Q. Did he ask?

A. Yes.

Q. What did he ask?

A. He asked how the other men felt about the Union. I said I couldn't answer for them.

* * *

[p. 67] DIRECT EXAMINATION

BY MR. WALSH:

Q. Just one question on that conversation that you had with Mr. Dwyer. You said it was in December of 1990. Was that before or after Allentown Mack took over? Do you recall?

A. I would say it was before Allentown Mack.

* * *

[p. 78] ROBERT J. DWYER,

a Witness herein, called for examination by counsel for General Counsel, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HELLER:

Q. Mr. Dwyer, what's your position with Allentown Mack?

A. I'm President.

Q. And you're also a partial owner of the company?

A. That is correct, yes, I am.

[p. 79] MR. HELLER: Your Honor, I request permission to examine Mr. Dwyer as an adverse witness.

JUDGE NATIONS: I think that's fair.

BY MR. HELLER:

Q. What are your duties and responsibilities as President of Allentown Mack?

A. I am President of Allentown Mack Sales and Services, responsible for the overall day-to-day activities.

Q. Are you familiar with all aspects of the company?

A. Yes.

Q. What position, if any, did you hold with Mack Trucks, Incorporated?

A. I was branch manager, most recently, with Mack Trucks, Incorporated, Allentown Branch.

Q. During what period of time?

A. I was branch manager from June 1985 until December of 1991 (sic).

Q. Did you work at –

A. Excuse me, I made a mistake. 1990.

* * *

[p. 100] Q. Under Mack Trucks, Inc., while you were general manager in the most recent years, what was the approximate volume of sales and other revenues – annual sales and revenues?

A. Well, going back to 1988, the sales of the Allentown Branch were a little under $90 million. And the actual deliveries, physical deliveries, were a little under 2400 vehicles.

1989 was very similar, it was 90 plus million, I think 91, 92 million. The actual unit sales for Mack Trucks, Allentown Branch, was over 2600 that year, I believe.

And 1990, I don't have the records because it's – they're not public. But it was very high.

Q. And how about Allentown Mack Sales and Service, what are the estimated revenues for the current year?

A. Estimated revenues for Allentown Mack Sales and Service are 9 million.

* * *

[p. 112] Q. If you know, what were the revenues of Mack Trucks, Inc. for the most recent years that you know of?

* * *

THE WITNESS: 1990 – the information is not available. In previous years, 1989, they had sales of $1.8 billion worldwide. 19 – it was in 1988, the year before that, it was over $2.2 billion sales for Mack Trucks, Incorporated.

* * *

[p. 117] Q. You testified that Allentown Mack had 32 mechanics, 1 janitor, 1 shop clerk and 11 parts employees; correct?

A. Approximately.

Q. And Allentown Mack has 23 mechanics and 7 parts employees; correct?

A. At the time we started.

Q. Okay. At the time you started – and a janitor, too, correct?

A. Yes, and a janitor.

* * *

[p. 129] RECROSS EXAMINATION

BY MR. FLINT:

Q. Mr. Dwyer, Mr. Heller asked you whether truck sales were slow in 1991. Were they slow in 1990?

A. Yes, they were.

Q. Has there been a recession in the trucking industry for some period of time?

A. Yes, there has been.

Q. About how long has that been going on?

A. Quite a few years.

• • •

[p. 200] BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of:		
ALLENTOWN MACK SALES & SERVICE, INC.,		
and		Case No. 4-CA-19516
LOCAL LODGE #724, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO		

The above-entitled matter came on for hearing pursuant to Notice before Wallace H. Nations, Administrative Law Judge, at 615 Chestnut Street, Courtroom One, Philadelphia, Pennsylvania, Wednesday, October 16, 1991, at 9:30 a.m.

APPEARANCES:

On Behalf of Respondent:

GEORGE S. FLINT, Esquire
Jackson & Nash
300 Madison Avenue
New York, New York 10017-5096

[p. 201] APPEARANCES (Continued):

On Behalf of Charging Party:

DENNIS P. WALSH, Esquire
Spear, Wilderman, Borish, Endy, Browning and Spear
Atlantic Building
260 South Broad Street
Suite 1500
Philadelphia, Pennsylvania 19102

On Behalf of Counsel for the General Counsel:

RICHARD HELLER, Esquire
Office of the General Counsel
National Labor Relations Board
615 Chestnut Street
Philadelphia, Pennsylvania 19106

[p. 202] INDEX

[p. 203] EXHIBITS

NUMBER	IDENTIFIED	RECEIVED	REJECTED
GC-11	336	343	
GC-12	346	349	
GC-13	346	349	
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GC-15	346	349	
GC-16	346	349	
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R-2	217	218	
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R-5	251		
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R-7	254	256	
CP-1	224	225	

[p. 204] PROCEEDINGS

(Time Noted: 9:30 a.m.)

JUDGE NATIONS: Let's go on the record.

* * *

[p. 211] ROBERT DWYER

was called as a witness and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. FLINT:

Q Mr. Dwyer, will you state for the record your name, your business address, and your title, and general responsibilities?

A Robert Dwyer. My business address is 1407 Bulldog Drive, Allentown, Pennsylvania 18104. My title is President. My business is Allentown Mack Sales and Service. My responsibility is for the overall function of the distributorship.

[p. 212] Q Will you state your educational background, give simply the highest degree you have received?

A Bachelor of Science, University of Maryland, 1978, College Park, Maryland.

Q Any additional technical or other courses since then?

A No.

Q Would you give your employment history, particularly as it relates to Mack Trucks, Inc.?

A 1978, I was employed by Mack Trucks as a trainee in Somerville, New Jersey.

In approximately 1981, I was transferred down to the Philadelphia Branch of Mack Trucks where I was a retail sales representative.

In approximately 1983, I was promoted to a District Manager Mid-Atlantic Sales for Mack Trucks, Incorporated, covering the five-state area calling on Mack dealers.

In 1985, I was promoted to Branch Manager of the Allentown Branch of Mack Trucks, Incorporated.

And, in December of 1990, I terminated my employment with Mack Trucks.

Q With Mack Trucks?

A Mack Trucks, Incorporated.

* * *

[p. 230] Q Mr. Dwyer, turning to the events leading up to your company's purchase of certain assets at the Allentown Branch, would you describe how you learned the branch would be sold, and what followed that?

A I received a phone call in May, mid-May 1990, from Holly Clayson, who is the director of branch operations. He notified me that Allentown Mack – I am sorry, Mack Trucks' Allentown Branch was going to be sold, hopefully to a private distributor.

On or about June 17th or so, I inquired information on a fax sheet from Mr. Clayson as to what would be the purchase price of the Mack Truck Allentown Branch Facility.

After I got all the fax sheet information, [p. 231] respective, we reviewed it, and notified Mack that we were interested in making a bid on the facility.

On approximately August 10th, I made a formal bid to Mack Trucks, Incorporated, on buying certain parts of the assets, and then the operation, and run that as an independent business.

On September 19th, I offered an addendum to my proposal, had to increase the bid because of competition.

I believe it was – I don't know the actual date that I received another phone call from Mack notifying me that I was the successful bidder, and that now had come the time that we had to sit down and begin negotiating the memorandum of understanding, and closing date.

* * *

[p. 236] Q Did Hamershock and Worth interview then current employees of Allentown Mack – I am sorry of Mack Truck's Allentown Branch?

A Yes, they did. In December, they interviewed Mack Truck's Allentown Branch employees.

Q Prior to these interviews, and while you were manager of the Mack Allentown Branch, did you receive from any employees any statements concerning support, or lack of support for union representation?

A Yes, I did.

Q Would you describe those statements and the circumstances under which they were given, and start [p. 237] with the earliest in your recollection?

MR. WALSH: I would object on hearsay grounds here, Your Honor.

If you would like, I would like to just briefly state an argument on that for the record. I think the content of the statement is going to be all important here. The ambiguity, certainly, of the statements under the case law is all important, and without an opportunity to cross-examine the employees who made them the contents of the statements cannot be fully and fairly litigated.

JUDGE NATIONS: Overruled.

BY MR. FLINT:

Q Mr. Dwyer, will you give the first of these statements that you recall?

A Yes. It would happen as far back, to the best of my knowledge, in '89 before the contract, the renewal of the contract in 1989.

Should I name individuals?

Q Yes.

A One individual in particular Mike Ridgick, who was the – who worked, he was a bargaining unit employee for the parts department. He came in there, and he mentioned to me, what was there that Mack Trucks had to offer the employees as compared to what the [p. 238] union was going to offer them.

There have been quite a few numbers of decertifications throughout, and he asked me what could he do. I told him that I was unable to respond to that. That we couldn't give any information, and I advised him to contact his counterparts at other Mack facilities, and get information from them.

Q Excuse me, Mr. Dwyer, when you say there have been some decertifications throughout, what did you mean, throughout what?

A Mack had quite a few factory owned facilities. There were a few of them that had decertified over the years, and I guess our employees were interested in knowing what the Mack company had to offer as compared to what the union had to offer them.

MR. WALSH: Objection and move to strike. That is speculation as to what the employees were interested in.

JUDGE NATIONS: At this state, gentlemen, this is what Mr. Ridgick said, according to what he said.

BY MR. FLINT:

Q Mr. Dwyer, anything further as to Mr. Ridgick's statement or discussion with you?

A No. Other than the fact that I think he came [p. 239] to my office twice about this, and there was no further discussion.

Q Anyone else at that time, or around that time?

A There is another statement made prior to that by Bill Wendling, who has since retired. He was a long-time Allentown Mack – Mack Truck's, Incorporated, employee, and he stated that he had wished that he would be in the management because of a better retirement package.

Q Did he say anything further, or did you respond to his statement?

A No, didn't respond to it at all.

Q At the time of the –

Were there any further statements at that time from any employees?

A Yes, there were many statements. I could take back from – I remember the one time when I was given the WARN letter to the employees, Mack made me read it to the employees and then hand it to the employees, and then have the employees kind of initial it.

Q And the WARN letter you are referring to is the –

A The one in July.

[p. 240] Q July of 1990?

A Yes.

Q After a meeting, when everybody left, Dennis Wehr, who was a parts bargaining unit employee mentioned to me that if I was elected principal of a new company that we didn't have to have a union, because we didn't need one.

Once again, I didn't respond to it at all. I just dismissed him from the room.

Q Did he explain what he meant by that in any way?

A That is all he said.

Q Was this in a private conversation with you, or in a group discussion with other employees?

A This was in a private conversation, unsolicited private conversation.

Some of the other – one member in particular, Rusty Hoffman, who is a mechanic, he works in the fire department, he was – We had discussions because when we hired him for the new company, we wanted to develop that business, the fire business, because we needed to expand that. He told me that if the new company was going to be union that he wasn't interested in working because he don't want to work in a union shop.

[p. 241] MR. WALSH: Objection, move to strike without a tying period.

JUDGE NATIONS: When did he tell you this?

THE WITNESS: Probably in December.

JUDGE NATIONS: In what year?

THE WITNESS: 1990.

I had a conversation with Ron Moore. He was shop steward at the time. I remember the conversation to be a little bit different than he said it, but I remember it to be in the shop itself, and I sat down and I did ask Ron how things were going. He was the shop steward, and we were kind of close.

He mentioned to me that with a new company that if we took a vote that the union would lose, and that it was his feeling that the guys didn't want a union.

I told him that is up to you. That is not up to me. You make the decision whether there is a union. I don't make the decision, and I will go one way or the other.

BY MR. FLINT:

Q Mr. Moore was shop steward of what department?

A Service.

Q Any other statements that were made directly [p. 242] to you?

A I remember Pete McArthur also came to me, prior to the 1989 contract, and he was also a bargaining unit employee, and was interested in decertification information. I told him that I couldn't discuss that. That it was information that he was going to have to get on his own. Once again, I recommended that he talk to the people who were his counterparts.

Q Any other direct statements to you?

A It was common, you know, unsolicited comments. I am not interested in the union.

MR. WALSH: Objection, Your Honor.

JUDGE NATIONS: Can you specify?

BY MR. FLINT:

Q During what period of time was this?

A I had his comments as soon as – as recently as Tuesday.

MR. WALSH: Objection, Your Honor, without any specifications as to who and what the comments were, it is totally irrelevant.

JUDGE NATIONS: I would also say, let's limit it to things that happened, if you can remember now

from the time it became known that you were going to acquire the assets of Mack up to the time you took that [p. 243] poll?

THE WITNESS: Your Honor, one in particular I remember although I can't give you a specific date, was Scott Murphy who was an hourly employee under the bargaining unit.

BY MR. FLINT:

Q Can you give a general date, if you can't give a specific date?

A He probably would mention it to me, you know, once a month over the last – from, I would say, since the last six months, you know, the last twelve months, probably once a month would be a comment, an unsolicited comment.

Q And what was the substance of the commenting?

A He was not for the union. He didn't like them. He didn't feel as though it was worth the dues that he was paying for the representation he was getting.

Q Any other direct comments to you?

A None that I can recall right now.

Q Did you also receive reports from your service manager, and parts manager in Allentown Mack Trucks following their interviews with prospective employees?

A Yes, I did.

[p. 244] MR. FLINT: Your Honor, we will be putting these gentlemen on as witnesses.

BY MR. FLINT:

Q Will you tell in substance what those reports included?

MR. WALSH: Objection, Your Honor, hearsay.

JUDGE NATIONS: I understand that. Overruled on the basis they are going to be put on and supply specifics.

THE WITNESS: They came back to me and told me that –

MR. WALSH: Objection, Your Honor.

I am sorry. I thought you sustained. I am sorry.

THE WITNESS: They came back and told to me that during their course of interviews, on occasion, the topic of the union's status with the new company was brought up, and that some of the interviewees, of if you want to call them applicants said that they weren't interested in the union, that they didn't think it was worth the dues, and they weren't getting anything out of it.

BY MR. FLINT:

Q Following those reports, and following your earlier, or later, direct comments, did you form any [p. 245] conclusion or opinion about the union's majority support at Allentown Mack Sales and Service?

A I guess I did.

Q What was that?

A That they did not represent the majority, the union did not.

Q At any time following the purchase of assets by Allentown Mack Sales and Service did you make any statement to the employees individually or as a group as to your preference with respect to a union?

A No.

Q To your knowledge, or in your presence, did either of your managers, your parts manager or your service manager, make any such statement?

A To my knowledge, no.

Q Following your purchase –

When did the purchase of assets close, if you recall?

A It was December 21st, 1990.

Q The purchase of assets as opposed to your commencement of business, wasn't that earlier?

A The memorandum of –

Q Of understanding.

A – of understanding, we signed it earlier than that.

[p. 246] Q But you actually closed the deal as of the 21st?

A The 21st.

Q On that date, or at any time up to January 7th, 1991, did the union request recognition of bargaining from you either orally or in writing?

A Never with Allentown Mack Sales and Service between those dates.

* * *

[p. 249] Q Mr. Dwyer, I show you Respondent's 4 for identification, which has at the top Notice.

(The document referred to above was marked Respondent's Exhibit No. 4 for identification.)

BY MR. FLINT:

Q I ask you whether you recognize that?

[p. 250] A Yes, I do.

Q What is that document?

A This is a notice that I put on the bulletin board for the stop maintenance employees, shop clerks and partsmen that Allentown Mack Sales and Service was going to conduct a poll and the date and time.

MR. FLINT: I submit this as Respondent's Exhibit 4.

JUDGE NATIONS: Any objection?

MR. HELLER: No.

MR. WALSH: No objection.

JUDGE NATIONS: Four is received into evidence.

(The document heretofore marked Respondent's Exhibit No. 4 for identification was received into evidence.)

BY MR. FLINT:

Q Mr. Dwyer –

MR. FLINT: Again, may I go off the record, Your Honor.

JUDGE NATIONS: No, let's stay on the record, if it doesn't make any difference.

MR. FLINT: This is simply to find out the location of the document that he had in his possession.

[p. 251] I need the statement you made to the employees on the ballot.

BY MR. FLINT:

Q Mr. Dwyer, on February 6, did you have a meeting of the employees, read a statement to them?

A It was on February 8th.

Q I am sorry, February 8th. You are correct.

Did you read a statement to the employees?

A Yes, I did.

Q And was that done in one or two sessions?

A Two sessions.

Q In a moment I will ask you to describe those two sessions.

First, I show you Respondent's Exhibit 5 for identification.

(The document referred to above was marked Respondent's Exhibit No. 5 for identification.)

BY MR. FLINT:

Q I ask if that refreshes your recollection as to the statement made to the employees?

A I guess it is.

Q What was the statement you made to the employees?

[p. 252] A A poll of our employees will be conducted on the supervision of Father Czaus this afternoon. the purpose of this poll is to ascertian whether the International Association of Machinists and Aerospace Workers, Local Union No. 724, actually represent the majority of the company's employees covered by the National Labor Relations Act.

We want to assure you that no reprisals will be taken against any employee regardless of how he votes, or the outcome of the poll.

The poll will be conducted by secret ballot, and only Father Czaus will see the ballots. He will simply report the results to us, and those results will be posted, and communicated to the union.

That is all I have to say about the poll. If you have any questions about the polling procedure, please ask Father Czaus after I have left the room.

Q And did you say anything further to either group of employees.

A No.

Q Did you, indeed, leave the room?

A Yes, I did.

Q Was any management employee left in the room?

A No, there was not.

• • •

[p. 256] Q Following the two groups entering the room, or being in the room without Father Czaus and yourself, [p. 257] or any management people leaving, what happened then?

A When he was completed with the poll, he tabulated the ballots privately.

Q Did he give you any of the ballots?

A No. He took all the ballots with him, and he advised us to the results.

Q Was his advice given in General Counsel 7A?

A Yes. This is what he gave me.

Q And did you do anything with that letter or statement by Father Czaus?

A I mailed it to Michael Walsh. I posted it on the bulletin board, and that was it.

• • •

[p. 268] Q You testified to certain statements that one Mike Ridgick made to you in 1989; correct?

A Correct.

Q At the time – and those referred to union benefits; correct?

[p. 269] A He questioned me in reference to decertification, and what Mack had to offer as compared to what the union had to offer.

Q Wasn't Mike your assistant parts manager in 1989?

A I don't believe he was.

Q Was he ever your assistant parts manager?

A Yes, he was.

Q Do you know the dates on that?

A I think the dates, it probably was prior to the closing for maybe a year-and-a-half.

Q So you don't know the exact dates, do you?

A No.

Q Is a year-and-a-half kind of a rough estimate?

A That is a rough estimate.

Q And then you testified to some statements by a Mr. William Wendling, is that W-e-n-d-l-i-n-g?

A Yes.

Q He was never hired by Allentown Mack, was he?

A No. He retired prior to that. He made these statement prior to the contract about the –

Q Back in 1989?

A Pardon me?

Q In 1989?

[p. 270] A It might have been the '86 contract, the '86 or '89. I might cross up those dates.

Q Is it possible that you crossed up the dates with Ridgick as well?

A It is also possible, not that you bring it to my attention. But they did make those statements to me.

Q Then you testified to comments by Mr. Dennis Wehr. Is that W-e-h-r?

A Yes.

Q And he was hired by Allentown Mack; correct?

A Yes, he was.

Q But he quit, is that correct?

A Yes, he did.

Q And that was on January 23rd, wasn't it?

A Thereabouts.

Q I think the date is of some importance, so I would like to refresh your recollection

MR. FLINT: Your Honor, I object to the comment of counsel that the date is of some importance.

JUDGE NATIONS: He can comment on anything he wants to. It doesn't make any difference.

BY MR. HELLER:

Q I would like to show you a document that the company provided, which purports to be its payroll [p. 271] master listing, would you please take a look at it, specifically as it follows Mr. Wehr?

A Okay, I see that.

Q Does that document indicate the date that he left the company's employment?

A To the best of my knowledge, yes.

Q And what date is that?

A It is 1/23/91.

Q And you testified to some statements made to you by Mr. Hoffman; correct?

A Yes.

Q What was his first name?

A Rusty Hoffman.

Q When were those comments made, exactly?

A In December, 1990.

Q December before Allentown Mack took over, or after?

A Yes, it was before Allentown Mack took over.

Q Approximately when in December, or the closest you can?

A I would say the middle of, the 15th, approximately.

Q It was after the interviewing process?

A I believe it was, yes.

Q So you already knew that Mr. Hoffman would be [p. 272] working for the company or not?

A I believe Mr. Hoffman was offered a job.

Q He had already accepted employment before he spoke to you?

A Yes.

Q And where did the conversation take place?

A It took place in my office.

Q Who else was present?

A Just myself and Rusty Hoffman.

Q About what time of day was it?

A I can't recall.

Q How did the conversation start?

A We were discussing – he is in the fire business, okay. He is our fire representative. With the new company that is a big part of our business, and we needed to develop that, and kind of take that fire business, and multiple what we had.

Q I am sorry to interrupt, but please keep it to how the conversation started and what was said rather than the whole –

A Well, it was a conversation. We were talking about what we are going to do and how we could develop this business, and he mentioned to me that he felt as though he would be restricted by a union shop, and he said he wouldn't work with a union shop.

[p. 273] Q And how did you respond to that?

A It was out of my control. I told him that. I told him not to worry about it.

Q Could you expand upon what you said to him, if there was anything else?

A I told him that it was exactly that, not to worry about it. It is out of my control, and leave it at that. It wouldn't be a problem one way or the other.

Q How did the subject of the union first arise during that discussion?

A He brought it up. He did not want to work in a union shop.

Q But you had been talking just about the fire business, and how you were going to expand it. How did the union figure into that?

A He mentioned it. He brought it up.

Q And you had a conversation with Ron Moore that you testified to; correct?

A That's correct.

Q When?

A That was also in December, late December. I am going to say, also approximately the 15th or so. I don't recall the actual date.

Q And you said it took place on the shop floor?

[p. 274] A That particular conversation I had with him I recall out in the unit.

Q And who else was present?

A There was nobody. It was a private conversation between Ron and myself.

Q Was John Grant in the room, I know he worked in the unit?

A There were people, more people.

Q But no one else joined in the conversation?

A No. They were doing their own thing.

Q do you know who might have been there working?

A No, I can't recall.

Q And how did that conversation start?

A Just general conversation of how things were going, and how is everything going in the shop, and things like that. Just a general conversation, which we would have frequently.

He mentioned to me that, you know, with a new company we don't need the union, and if the vote was taken right now the union would be out.

Q Isn't it true that you asked him how he felt about the union for the new company?

A No, sir. I did not. Never.

Q Did he indicate which employees would vote [p. 275] which way?

A We didn't get turned to that conversation.

MR. HELLER: May I go off the record?

JUDGE NATIONS: Off the record.

(Discussion held off-the-record.)

JUDGE NATIONS: Back on the record.

BY MR. HELLER:

Q And then you testified to a conversation with a Mr. McArthur; correct?

A Yes.

Q And he said that that occurred in 1989?

A That might have been before, also.

Q It could have been '86, could have been '89?

A Yes.

Q But Mr. McArthur was never hired by Allentown Mack?

A That is correct.

Q And then you spoke to Scott Murphy. You said he made some comments to you?

A Yes, he did.

Q And let's try and be as specific as we can as to when those comments were made?

A Like I mentioned in the testimony, it would happen almost monthly, a certain comment, and the comment would normally be that – he would normally say [p. 276] to me that he wasn't interested in union representation.

Q Did he make any comments in January of 1991?

A Yes, he did.

Q And can you pin the date down anymore?

A No, I cannot.

Q Where did the conversation take place in January of 1991?

A I would hear comments from the shop floor.

Q I am just referring to that month.

A Just in general conversation in the building. I can't recall where the specific location was.

Q Do you remember who else was present when he made a comment in January 1991?

A Not to my knowledge, no, I can't.

Q And in January 1991, what were his exact words to you?

A I can't remember the exact words, but he told me that he felt as though he wasn't getting the proper representation for his dues, and wasn't interested in union representation.

Q Are you sure that that was the conversation that was in January?

A I can't be assured it was the exact conversation.

[p. 277] Q He made different statements at different times, and he didn't say the same one every time?

A Unsolicited statements, and which I wouldn't respond to.

Q What were his exact words in February, to the best of your recollection?

A I believe in February, I can't remember the exact date, he was the individual that told me about the little black book, and how they had to pay unemployment dues, and it was a dollar a month.

Q So he didn't say in February that he didn't want the union, he just told you about the book; correct?

A Yes, that's correct.

Q And in December of 1989, what did he say about the union in December of 1990?

I am sorry.

A They were the same general comments. He expressed a disinterest in the union representation.

Q Are you sure that that is what he said in December that he expressed that, or could it have been another time?

A It was then and at other times.

Q What part of December was it that he said this?

[p. 278] A I would have to say it was in the middle of December, probably early December.

Q Where was it?

A Just in the general building.

Q He expressed dissatisfaction with his union representation at that time?

A Yes.

Q And did he also specifically say that he didn't want the union to represent him, or did he just say that he felt the dues were a waste of money, or something like that?

A He would say both of those things.

Q In December he said both?

A I can't be specific about what he said in December.

Q So he said it at some point, but you are not sure exactly?

A Yes. He would say it all the time.

Q He didn't say the same thing every time, right?

A No, he didn't say –

Q Sometimes he might have expressed dissatisfaction with the representation; correct?

A Yes.

Q Sometimes he might have expressed that he [p. 279] didn't want to pay the dues; correct?

A Yes.

Q And sometimes he might have said he didn't want the union at all; correct?

A Right.

Q Sometimes he told you about the black book; right?

A One time.

Q But you don't know which he said in which month; right?

A He said the black book was in February or March.

Q And other than the comments by Scott Murphy which happened a lot, the other ones that you were talking about, all occurred before Allentown Mack started operating; correct?

A Yes.

* * *

[p. 298] Q You testified about a conversation that you had with Dennis Wehr, am I correct that this was at the very time or just after you handed him the letter saying that there was going to be a change in ownership at Mack?

A Yes, it was I read the letter.

Q Just after you read it?

A Yes.

Q From Mr. Hoffman, you stated that this was in December, 1990, prior to the change in ownership, but he had already been hired by Allentown Mack?

A Yes.

A Yes.

Q The change in ownership was December 21st. Can you estimate how long prior to that?

A I think I testified approximately the middle of the month, the 15th. I know that it was December when he was hired, but I don't know the exact date.

Q Approximately the 15th of December. Do you think that it was less than a week before the transfer of ownership?

A I think that it was a little more than a [p. 299] week.

* * *

[p. 304] DAVID WAYNE WORTH
was called as a witness, and having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. FLINT:

Q Mr. Worth, would you give us your full name and your business location?

A David Wayne Worth, and my business location is 1407 Bulldog Drive, Allentown Mack Sales and Services.

Q What is your position at Allentown Sales and Service?

A Service manager.

Q Prior to December 21, 1990, were you an employee of Mack Trucks, Inc.?

A Yes, I was.

* * *

* * *

[p. 305] Q As service manager, who did you have reporting to you, again under Mack Trucks, Inc.?

A Who did I have reporting to me?

Q In other words, who were you responsible for, what employees?

A Mechanics and foremen.

* * *

[p. 307] Q In December, 1990, did you or not interview people for the mechanics jobs for Allentown Mack Sales and service, Inc., and if so, would you please try to give the approximate date of those interviews?

A I would have to say, yes, I did, and I would have to say, it would have been in the first week or so of December.

Q Did this occur on more than one day?

A Yes. I believe it was on two individual [p. 308] days.

Q What did you do?

A I called them in one by one, and I interviewed them.

Q Who did you call in?

A The mechanics, and I called them in one by one. I interviewed them for a position with the new company.

Q These were mechanics employed by Mack Trucks, Inc.; is that correct?

A Yes.

Q During those interviews, did any of the individuals make any statement or comments to you concerning union representation?

A Yes, a few.

Q Were those statements made to you on a confidential basis?

A Yes, they were.

Q Can you tell the judge what those statements consisted of to the best of your recollection, the substance of those statements?

MR. WALSH: I am going to renew my initial objection to the statements on the grounds that I stated before.

JUDGE NATIONS: I will sustain it.

* * *

[p. 310] Q Mr. Worth, be specific as to who talked to you and made statements to that effect or to any effect concerning the union representation, and when this occurred?

A Again, approximately the first week in December, I interviewed Joe McKilvie for a position. He had asked me, is there going to be the union present?

At that time, I didn't know. He said, my opinion is that we would work better without one. He was against the union.

Q Did you say anything further to him about it?

A No. He gave me his opinion of how he felt, and that was basically all.

Q Did anybody else?

A Milt Solt, again, basically, it came up about [p. 311] the union, and I didn't give any answer either way as to what would happen, and said that he didn't feel comfortable with it because he felt that it was a waste of $35 a month.

There was also Rusty Hoffman.

Q What did he say, if you recall?

A He said that he would vote out the union. He said, I would try to find another job if I have to work under the union.

Q Is there anybody else that you can recall?

A There were other people who mentioned it. Scott Murphy had mentioned it, basically, that he didn't want to work for a union.

Kermit Bloch had mentioned it.

MR. WALSH: Objection without a specification as to time and place.

JUDGE NATIONS: Would you give a time?

THE WITNESS: It was basically the same time, when I interviewed those same personnel.

BY MR. FLINT:

Q Were there any subsequent times?

A There was a conversation with Kermit, I believe, later on, that I had in the shop. He just came up to me and started talking about things. He brought up the union.

[p. 312] He was a night shift mechanic, and he said that his feelings were, and the whole night shift's feelings were that they didn't want the union, the whole night shift.

Q When was this, do you recall?

A It was after the interviews. It was approximately a week or so later, maybe two weeks later.

Q So that was sometime in the middle to later December, 1990?

A Yes.

Q This was Kermit Bloch stating as to the entire night shift?

A The entire night shift, yes.

Q How many employees are there on the night shift?

A Right now or at that time?

Q At that time?

A I believe that there were five or six.

Q Five or six?

A Yes.

Q Any other conversations or statements that you recall?

A No. Tim Frank had mentioned it at the time of the interview that he didn't feel that he wanted to [p. 313] work with the union now, or that he would rather not have the union there.

Q This was the same earlier period when you interviewed the employees?

A Right.

Q Altogether, do you recall how many employees you interviewed?

A I interviewed every one of the mechanics at that time.

Q So that would have been approximately how many?

A Approximately 31, I believe. It was 31 because two of them, I believe were out on compensation at that time.

Q During your interviews, did you at any time solicit or request the people who were interviewing to indicate whether they favored a union or didn't?

A Did I request that?

Q Yes.

A No.

Q Did you receive any instructions from Mr. Dwyer or anyone else with respect to that subject matter?

A No.

* * *

[p. 318] Q You referred to several comments by employees that were made during interviews; correct?

A Yes.

Q All those comments were made before these individuals had been offered jobs with the company; correct?

A I was doing their interviews, yes.

Q You didn't take everybody you interviewed; right?

A No, I did not.

Q Did any employees say that they wanted the union to continue representing them during the interviews?

A I didn't bring it up, and a lot of them didn't bring it up. The main thing that I remember that was brought up was individuals who brought up that they were against it.

Q Did some bring up that they were for it?

A I can't recall.

Q Is it possible?

A It is possible, but I just can't recall any instances where it did.

Q Did you take notes during the interviews?

A No, I did not.

Q When did you report people's comments to Mr. [p. 319] Dwyer?

A I would say, I believe it was reported after they were hired.

Q Sometime in January or February?

A I would say, after the interviews, I don't know what time. I would say that it was after the interviews were done; of course, it had to be. I am not sure about that. I would say, somewhere in January, it could be.

Q It was after Allentown Mack had started operating?

A Yes.

Q Why did you bring that subject up?

A I don't recall how it came up. I really don't recall. We were in a conversation and it just came up.

Q Did Mr. Dwyer ask you if the employees had said anything about the union?

A He may have. I don't recall how it came up, I really don't.

Q The comments that Milton Solt made, were they during the interview?

A They were during the interview.

Q How did the subject arise with Mr. Solt?

A Milt is an easy going guy, and he basically [p. 320] just brought it up in the conversation, is there going to be union here. I said, I am not sure. I am interviewing you for a position to work here. You have to understand him, he is a little backwards in a way, and he just gave his opinion on it.

Q Which was what?

A Which was basically that he –

Q I apologize for interrupting you, but I want you to use his exact words to the best of your recollection, and not an impression.

A He said he didn't need a union, and he thought that it was a waste of $35 a month.

* * *

[p. 324] JUDGE NATIONS: Do you recall exactly when Scott Murphy made the statement to you?

THE WITNESS: That was after the new company took over, I believe.

JUDGE NATIONS: So it wasn't during the interview?

THE WITNESS: I am not sure. I am not sure when he exactly made the statement. I just recall the statements.

JUDGE NATIONS: You are sure that those are [p. 325] his exact words?

THE WITNESS: No, I am not sure that those were his exact words.

JUDGE NATIONS: Kermit Bloch, that was a week or two after the interview?

THE WITNESS: I believe so, yes.

* * *

[p. 328] Q You mentioned a conversation with an employee named Jim Frank.

A Yes. I remember talking to him, yes. He was talking about daily business, and he ventured something about he didn't need one, or something like that.

Q When was that conversation?

A I can't recall. It is very vague. I know of the conversation, but at the time I didn't think anything of it, if you know what I mean.

Q Do you know if it was this year or last year?

[p. 329] A Again, I can't recall.

* * *

JAMES HAMERSHOCK

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLINT:

Q Would you give your name, your position, and your business address for the record please?

A James F. Hamershock, Allentown Mack Sales and Service, parts manager, 77844 –

Q As best you can remember?

A I will tell you what, I am a little nervous, guys. It is Bulldog Drive, Allentown, Pa.

Q That is good enough. I think we all know where it is.

* * *

[p. 331] Q During that time, did there come a time when you were asked by Mr. Dwyer or someone to interview prospective applicants for employment at Allentown Mack Sales and Service?

A Yes, I was.

Q Did you do so?

A Yes, sir.

Q Would you describe about when those interviews took place, and what your procedure was?

A Those took place, I believe, during the first week in December.

My procedure, after talking to Mr. Dwyer, was to set a guideline of what the pay scale would be, what the benefits would be. From that point, I randomly chose

employees of the Allentown Branch, and held an interview with them.

I explained what was going to happen, that it would be a new company. I explained to them what the possible pay rate would be. I didn't give anybody any –

How can I say this. I didn't mislead anybody into telling them that I was going to hire them. I was in there interviewing them, asking them questions, [p. 332] getting some feed back from them.

Q Do you recall how many Mack Truck employees you interviewed?

A Seven.

Q During the course of those interviews, were you told anything by an of those employees as to their desire with respect to union representation?

A Yes.

Q Was that told to you in confidence?

A Basically, I believe so. I would have to say, yes.

Q Can you describe more specifically the individuals and the times that those conversations took place?

MR. WALSH: I just want to renew my general hearsay objection again, for the record, on the same grounds as the objection I made when Mr. Dwyer testified about this.

JUDGE NATIONS: Overruled.

THE WITNESS: Could you repeat the question?

BY MR. FLINT:

Q Can you be more specific as to the individuals who told you that they had some comment about union representation?

A During the course of the interviews, I [p. 333] believe I started off with Dennis Wehr. He was the first person I interviewed, and he made the comment to me, what about the union. I said: That is up to you people. At this point in time, I have no idea.

Q Did he say anything further about that subject?

A No. He more or less dropped it at that point.

I also interviewed Mike Ridgick. Here again, those questions were always directed at me: What about the union? At that point, I could virtually say nothing because I didn't know what was going to happen. Mike told me that as long as we would treat them right, there really would be no need for a union.

Q Did he say anything further about that subject?

A No.

Q We are talking about the first week in December when these interviews took place.

A Yes.

Q Did you do this all in one day, or more than one day?

A It was one day for the first interview, and then I re-interviewed telling certain people that this is what we are going to do.

Q What you are describing took place at the [p. 334] first interview?

A Yes.

I also recall interviewing Dave Baker, and Dave sat back and slouched back and said: What are you going to do about the union?

Here again I said: This is totally up to the people, I don' know.

He said: That is good because as far as I am concerned, I have no use for it.

After that, I believe I interviewed Dennis Marsh, and Dennis more or less gave me the comment that he wasn't being represented for the $35, if I remember the way he phrased it, he wasn't being represented for the $35 he was paying.

Q Again, did you make any response to that?

A None, none at all.

Q Did anybody else say anything about the union one way or the other?

A Here again, Randy Zoltack, at the time, he was not initially hired, he was hired in February sometime. I had brought him in because we were in need of another person because one person had resigned. I interviewed him, and he made the comment that it was a waste of $35 because he did confront me about the union again.

[p. 335] MR. WALSH: I have to object as to relevance because it is after the poll was taken. It has no relevance to the time period.

BY MR. FLINT:

Q Do you remember the date in February?

A I believe I interviewed him at the end of January from what I recall.

MR. FLINT: Excuse me, Your Honor, may I have a moment?

JUDGE NATIONS: Let's go off the record.

(Discussion was held off the record.)

JUDGE NATIONS: Let's go back on the record.

BY MR. FLINT:

Q To the best of your recollection, that took place at the end of January, before the poll?

A From what I can remember, yes.

Q You said that you interviewed seven Mack Truck parts employees, I take it?

A Correct.

Q Of those seven, how many were hired?

A The seven.

Q Not all of those seven individuals made comments about the union; is that correct?

A That is correct.

Q You hired all seven?

[p. 336] A Yes, sir.

Q Did you report these comments, or these remarks to Mr. Dwyer?

A I believe I did, yes.

Q Do you remember when you did that?

A I would believe towards the end of that week, and the first of the week.

Q You are talking about the first week in December?

A Yes, sir.

* * *

[p. 344] MICHAEL WALSH,
was recalled as a witness in rebuttal and, having been previously duly sworn, was examined and testified further as follows:

REBUTTAL DIRECT EXAMINATION

BY MR. HELLER

Q Between the time that you learned that Mack Trucks, Inc., selling that facility in Allentown, did you have any meetings with members of the bargaining unit?

A We had a meeting on 8/26, I think it was, when we first got the early notice, and then it was postponed a couple of times. Then we had a meeting on 12/16/90 where we presented the company's proposal for [p. 345] the close down agreement.

Q Did the topic of union dues arise at either of those meetings?

A After we presented the company's proposal, and the members voted on it –

Q Are you referring to the 12/16 meeting?

A Correct.

Q Where was that meeting held?

A At the Days Inn, which is right down the street.

Q About how many individuals were present?

A Around 29 or 30.

We presented the company's offer, and they voted on it. When that was over, I explained to them that they had several options in regard to union dues, and one of those options was that they could take an honorary withdrawal card, which cost you a dollar, and that freezes your membership indefinitely.

The second option was that they could continue to pay a dollar a month, which keeps you as a member. The only difference between the two –

We could not charge them full dues. We felt that they were not covered under collective bargaining agreement, and we were negotiating rates of pay or any of the effects of a collective bargaining agreement, so [p. 346] there was no way that we could charge them full dues. We gave them those two options, take the withdrawal card, or continue to pay the dollar a month.

Q Would you indicate what would happen if the union again represented the employees of that facility?

A In regard to the dues?

Q In regard to the dues or initiation fees?

A If the union represented the employees again, with the dollar, you would just pay dues starting with the

first month. With the honorary withdrawal card, it would cost you $10 to be reinstated.

(The documents referred to above were marked General Counsel's Exhibits No. 12 through 16 for identification.)

BY MR. HELLER:

Q I just handed you a series of five photocopies of cards, could you identify them please?

A Yes. These are copies of the authorization cards that I passed out and the members filled out that day, 12/16/90.

Q Did you ever see them after you passed them out?

A The cards?

[p. 347] Q Yes.

A When I collected them after they filled them out.

Q Can you read the names of the individuals whose cards I have just given you?

A Sure. We have Dennis Wehr, Ronald Mohr, Milton B. Solt, Randall N. Zoltack, and Joe McKilvie.

MR. HELLER: I have no further questions.

JUDGE NATIONS: Do you have any questions, Mr. Walsh?

MR. WALSH: Yes.

REBUTTAL CROSS-EXAMINATION

BY MR. WALSH:

Q Approximately how many employees were at that meeting?

A I believe there were 29 or 30.

Q Do you know, out of those 29 or 30 how many employees signed cards?

A I believe I collected 25.

* * *

[p. 352] MICHAEL RIDGICK,
was called as a witness in rebuttal and, having been previously duly sworn, was examined and testified further as follows:

REBUTTAL DIRECT EXAMINATION

BY MR. HELLER

Q State your name please?

A Michael Ridgick.

Q You were a long time parts employee and assistant parts manager for Mack Trucks as you testified yesterday?

* * *

[p. 353] Q Then you were interviewed for employment with Allentown Mack; correct?

A Yes.

Q With Mr. Hamershock?

A Yes, he brought me in to talk to me, but I talked to Mr. Dwyer before that.

Q But you then had a conversation with Mr. Hamershock?

A Yes.

Q Where was the conversation?

A In the parts manager's office.

Q Was anyone else present?

A No.

Q Do you remember about when it was?

A I think Jimmy came there the last week before we closed, so the week of the 21st of December, somewhere in there. It was before that, he was there the first week.

Q Could you please describe your discussion [p. 354] with Mr. Hamerstock?

A He called me in, and he sat me down and he told me that he understands that I am going to stay on with him. I said: Yes.

He more or less said that he was going to be using me probably at the back counter because he had Dave Baker up at the front counter.

I said: I have no problems with that. I worked with the mechanics before. Everything was fine, and I said: What are the wages? He told me. He said: There won't be any union. I said to him: As long as you treat the people

right, you won't need a union; or I said, you won't need the union if you treat the people right. I said one of them things, but I don't know which one I said.

* * *

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

March 3, 1997

Mr. Earle K. Shawe
Shawe & Rosenthal
20 South Charles Street
Baltimore, MD 21201

Re: Allentown Mack Sales and Service, Inc. v. National Labor Relations Board No. 96-795

Dear Mr. Shawe:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

No. 96-795

In The

Supreme Court of the United States

October Term, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF PETITIONER ON THE MERITS

EARLE K. SHAWE*
STEPHEN D. SHAWE
ERIC HEMMENDINGER
ELIZABETH TORPHY-DONZELLA
SHAWE & ROSENTHAL
Sun Life Building
20 S. Charles Street
Baltimore, MD 21201
(410) 752-1040

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION FOR REVIEW

Whether the National Labor Relations Board erred in holding that a successor employer cannot conduct a poll to determine whether a majority of its employees support a union unless it already has obtained so much evidence of no majority support as to render the poll superfluous?

PARTIES TO THE PROCEEDING

In addition to Allentown Mack Sales and Service, Inc.[1] and the General Counsel of the National Labor Relations Board, the parties to the Board proceeding included Local Lodge 724, International Association of Machinists and Aerospace Workers, AFL-CIO. The Union did not participate before the United States Court of Appeals for the District of Columbia.

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[1] Allentown Mack is not publicly traded and has no parent or subsidiaries.

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OPINIONS BELOW

The Court of Appeals' decision is reported at 83 F.3d 1433, 152 L.R.R.M (BNA) 2257 (D.C. Cir. 1996) (Appendix A to Petition for Certiorari). The National Labor Relations Board's decision, including the Administrative Law Judge's decision, is reported at 316 N.L.R.B. 1199, 149 L.R.R.M. (BNA) 1051 (1995) (Appendix B to Petition for Certiorari).

JURISDICTION

The Court of Appeals issued its decision on May 21, 1996. The Court of Appeals denied Allentown Mack's Petition for Rehearing and Suggestion for Rehearing In Banc on September 13, 1996 (Appendix C to Petition for Certiorari). On November 19, 1996, Allentown Mack filed a petition for a writ of certiorari with the United States Supreme Court and on March 3, 1997 the Court granted the writ. (JA 1, 65.)

The Court has jurisdiction under Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) and 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 7 of the National Labor Relations Act states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other

> concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157.

Section 8(a)(1) of the Act states, "It shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1).

Section 8(a)(5) of the Act states, "It shall be an unfair labor practice for an employer – (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a)(5).

STATEMENT OF THE CASE

In May of 1990, Mack Trucks, Inc., notified the manager of its truck sales and service branch in Allentown, Pennsylvania, of its intention to sell the branch. (JA 20, Pet. App. 32-33.) The branch manager, Robert Dwyer, and two other managers formed Allentown Mack Sales and Service, Inc., to bid for and purchase the assets of the business and operate it as an independent dealership. (JA 20-21, Pet. App. 32.) The sale was effective December 21, 1990. (Pet. App. 35.)

In the year before the sale, Mack Trucks, a global business, earned $1.8 billion dollars in revenues. (JA 15.) The pre-sale revenues for the Allentown branch were $90-100 million, based on sales of about 2400 trucks per year. The new Company's projected revenues were a fraction of that amount – about $9 million per year, based on sales of about 90 trucks per year. (JA 14, Pet. App. 39.) The chief reason for this revenue reduction was that Mack Trucks did not sell to Allentown Mack the ability to make fleet sales, but transferred that work to other Mack Trucks branches. (Pet. App. 39.) In addition, the sale took place in a slow market caused by a several year recession in the trucking industry. (JA 15.)

The new Company did not hire all of the service and parts employees previously employed by Mack Trucks. The new Company hired 32 out of 45 of them. (Pet. App. 39-40.) Those who were hired accepted reduced pay, with an assurance that as the Company grew, "the employees would also grow with us." (Tr. 340-41.)

Local Lodge 724, International Association of Machinists and Aerospace Workers, AFL-CIO, had represented employees of Mack Trucks' service and parts departments at the branch since 1973. (JA 5, Pet. App. 28.)

During the period immediately before and after the sale, seven employees made statements to the owner/managers and other supervisors that the National Labor Relations Board accepted as proof that they no longer supported the Union. (Pet. App. 2, 13.) Those employees expressed rational reasons for no longer wishing to be represented. For example, Milt Solt thought that the Union was a waste of $35 per month, the amount he paid

in dues. (JA 41, Pet. App. 50.) Joe McKilvie said he was against the Union and that "we would work better without one." (JA 47, Pet. App. 50.)

A number of other employees made statements that the Board refused to consider as evidence of loss of support. Kermit Bloch, who had been a night shift mechanic for Mack Trucks, expressed disapproval of the union in his job interview and also told a supervisor, on another occasion, "that the entire night shift did not want the Union." (JA 48-49, Pet. App. 51.) Although Bloch's statements were counted as evidence that he did not support the Union, the Board refused to credit them as evidence supporting Allentown Mack's doubt that the night shift employees supported the Union. There were five or six employees on the night shift. (*Id.*)

Ron Mohr, a member of the Union's bargaining committee and shop steward of the service department, where 23 of the 32 employees worked, told branch manager Dwyer, "with a new company, if a vote was taken, the union would lose and that it was his feeling that the employees did not want a union." (JA 25-26, 38-39, Pet. App. 53-54.)

Four other employees made statements that the Board refused to count for other reasons.[2]

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[2] Dennis Marsh said he was not being represented for the $35 he was paying in monthly union dues. The Board found that this "seems more an expression of a desire for better representation than one for no representation at all." (JA 57, Pet. App. 51.)

Mike Ridgick was discounted because he was a manager at the time he stated his opposition to the Union in a job interview for a bargaining unit job. (Pet. App. 48.) The Board found that his status as a manager made his statement less reliable than other employees' statements made in job interviews, which the Board counted.

Dennis Wehr's opposition to the Union was not counted because he quit on January 23, 1991, two days before the Company sent its January 25, 1991 letter to the Union. The employee who apparently replaced him, Randy Zoltack, said the union was a waste of $35 (the amount of dues). He was not counted because he was hired after January 25, 1991, even though he was employed at the time of the poll. (JA 57-58, Pet. App. 49, 51.)

On January 7, 1991, the new Company received from the Union a demand for recognition and bargaining. (Pet. App. 30.) On January 25, 1991, the Company wrote back declining to enter into bargaining, "at least until further investigation," because it had a good faith doubt as to the Union's continued majority support. The letter further stated that in order to ascertain the employees' views concerning the Union, the Company had arranged for an independent secret ballot poll to be taken on February 8, 1991. (Pet. App. 30.)

A Roman Catholic priest conducted the poll of the employees. (JA 31-33, Pet. App. 14, 58.) The results were 19 to 13, against Union representation. (Pet. App. 14.) The Union responded, on February 12, 1991, that it did not recognize the results of the poll and that it intended to pursue legal remedies. (Pet. App. 44.) Thereafter, the Union filed an unfair labor practice charge against the Company. The Union did not petition the Board to hold an election.

On January 24, 1992, the Administrative Law Judge issued a decision finding that although the poll was conducted in a lawful manner[3] (Pet. App. 59-60), the Company was not entitled to conduct the poll in the first place because it did not meet the Board's "good faith reasonable doubt" standard for polling employees.[4] (Pet. App. 55-56.) As the ALJ wrote, "This reasonable doubt must be based on sufficient objective considerations to justify withdrawal of recognition from an incumbent union." (Pet. App. 45.) The ALJ found that six or seven out of 32 employees made statements "which could be used as objective considerations supporting a good-faith reasonable doubt as to continued majority status by the Union." (Pet. App. 52.) Accordingly, the ALJ found that the Company violated Sections 8(a)(1) and 8(a)(5) of the Act by conducting the poll and by refusing to recognize the Union based on the poll results. (Pet. App. 56.)[5]

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[3] The poll satisfied the procedural safeguards set forth in *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967) and *Texas Petrochemicals*, 296 N.L.R.B. 1057 (1989), *remanded as modified*, 923 F.2d 398 (5th Cir. 1991).

[4] The Board's standard was most fully explained in *Texas Petrochemicals Corp., supra.*

[5] The ALJ acknowledged, in a footnote, that three Courts of Appeals require less evidence of disaffection for the Union than the Board, but expressed "doubt" that the level of disaffection he credited would meet the lesser standard. The ALJ did not, however, consider the evidence under the lesser standard. (Pet. App. 53, n.7.)

On April 12, 1995, more than three years after the ALJ's Decision and more than four years after the withdrawal of recognition, the Board affirmed the ALJ, on slightly modified grounds.[6] (Pet. App. 19-28.).

The Board adopted the ALJ's approach to the "good faith reasonable doubt" standard, which consisted of a head count, counting an employee as anti-union only if he made a statement that the Board accepted as unequivocal proof of opposition to the Union. (Pet. App. 22-24.) As the ALJ observed, that is the same test the Board uses to determine if an employer can lawfully withdraw recognition from a union. (Pet. App. 45.) The Board, like the ALJ, did not consider the evidence cumulatively.

The Court of Appeals, in a 2-1 decision, enforced the Board's decision. Acknowledging that the Board's standard "has its faults" (Pet. App. 8), the Court of Appeals majority declined to follow three other Courts of Appeals which have rejected the Board's standard. *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295 (9th Cir. 1984); *Thomas Indus. Inc. v. NLRB*, 687 F.2d 863 (6th Cir. 1982); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981). Those courts allow polling to determine if a majority of employees continue to support a union if there is substantial objective evidence of loss of union support, even if that evidence is not sufficient by itself to justify withdrawal of recognition. The Court of Appeals' decision

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[6] The Board found that the Company violated only Section 8(a)(1) of the NLRA by conducting the poll, not Section 8(a)(5). (Pet. App. 26 n.9.) The Board adopted the ALJ's finding that the withdrawal of recognition violated both sections. (Pet. App. 25-26.)

was accompanied by a vigorous dissent. (Pet. App. 13-18).

SUMMARY OF ARGUMENT

The Board's standard for employer polling is not entitled to deference because it is irrational and contrary to the Act. Although polls are preferable to unilateral withdrawals of recognition, the Board irrationally sets the same standard for both. The Board defends its standard for employer polling by arguing that it should be consistent with the standard for Board-conducted elections based on employer petitions (RM petitions). However, the standard for RM petitions is also the same as the standard for withdrawals of recognition, which is equally irrational. The result of the Board's standard is that an employer can poll only when there is no need to do so.

The Board permits polling during the organizational phase because it is relevant to the union's claim for recognition. Polling is equally relevant to a successor employer faced with a claim for recognition. Section 8(a)(1) should not discriminate between polls in which unions stand to gain and polls in which they stand to lose because Section 7 places the right to engage in union activity and the right to refrain on an equal footing.

Although the Board continues to cite "good faith doubt" as the applicable standard, its application of the standard requires proof, via a head count, of actual loss of majority support. The Board's practice is an unacknowledged departure from its own precedent. If good faith doubt, as opposed to proof of loss of support,

is the standard, there was sufficient evidence to conduct a poll in this case.

ARGUMENT

I. LEGAL BACKGROUND

A. Successorship and withdrawals of recognition.

Under Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), a union that represented the employees of an asset seller is presumed to represent the employees of the buyer, if a majority of the employees hired by the buyer previously worked for the seller. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Burns Int'l Security Serv., Inc.*, 406 U.S. 272 (1972). The new employer can rebut the presumption of majority status and withdraw recognition by showing (1) that the union did not in fact enjoy majority support or (2) that the employer had a good faith doubt, founded on a sufficient objective basis, of the union's majority support. *Harley-Davidson Transportation Co.*, 273 N.L.R.B. 1531 (1985) (good faith doubt test applied to successor). *See also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 779 (1990) (test applied to non-successor); *Celanese Corp. of America*, 95 N.L.R.B. 664, 673 (1951) (same).

A withdrawal of recognition must be made in a timely manner, before a contract bar comes into effect.[7]

[7] When a collective bargaining agreement is in effect, the Board will not entertain a petition. A contract bar can last up to three years. *Auciello Iron Works, Inc. v. NLRB*, ___ U.S. ___, 116 S. Ct. 1754 (1996).

Auciello Iron Works, Inc. v. NLRB, ___ U.S. ___, 116 S. Ct. 1754 (1996). A withdrawal of recognition can be based on the results of a poll. *See, e.g., Paper Board Cores, Inc. of Ala.*, 292 N.L.R.B. 995, 1001-02 (1989).

Although the Board continues to cite the words of the good faith doubt branch of its withdrawal of recognition standard, *NLRB v. Curtin Matheson Scientific*, 494 U.S. at 788, n.8, it has in practice eliminated the good faith doubt branch in favor of a strict head count. The Board's "preoccupation with a head count requirement is evident." *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d 1428, 1432 (10th Cir. 1990).[8] As one commentator has observed, "there is often a significant disparity between the Board's articulated adjudicative standard and its application of that standard." Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U.L.Rev. 387, 394 (1995) (hereinafter, *"Hiding the Ball"*). The commentator continued:

> A thorough review of withdrawal of recognition case law . . . reveals that circumstantial evidence, no matter how abundant, is rarely, if ever, enough to satisfy the good-faith doubt test. In practice, the Board deems the test satisfied only if the employer has proven that a majority

[8] Examples of the Board's preoccupation with a head count are numerous. *See, e.g., Alcon Fabricators*, 317 N.L.R.B. 1088 (1995); *Phoenix Pipe & Tube*, 302 N.L.R.B. 122, *enf'd*, 955 F.2d 852 (3d Cir. 1991); *Johns-Manville Corp.*, 289 N.L.R.B. 358 (1988), *enf. den.*, 906 F.2d 1428 (10th Cir. 1990); *Tube Craft, Inc.*, 289 N.L.R.B. 862, 863 n.2 (1988); *Tile, Terrazo & Marble Contractors Ass'n.*, 287 N.L.R.B. 769, n.2 (1987), *enf'd sub nom., U.S. Mosaic Tile Co. v. NLRB*, 935 F.2d 1249 (11th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992).

> of the bargaining unit has expressly repudiated the union. Such direct evidence, however, is nearly impossible to gather lawfully. Thus, the Board's good-faith doubt standard, although ostensibly a highly fact-dependent totality-of-the-circumstances test, approaches a per se rule in application: Withdrawals of recognition will nearly always be found unlawful.

Id.[9] *See also NLRB v. Curtin Matheson Scientific*, 494 U.S. at 797 (Rehnquist, C.J., concurring) ("some recent decisions suggest that it [the Board] now requires an employer to show that individual employees have 'expressed desires' to repudiate the incumbent union in order to establish a reasonable doubt of the union's majority status.")[10]

[9] This commentator previously wrote, "the Board construes the good faith doubt standard so strictly in the withdrawal of recognition context as to effectively require the employer to prove that the union has in fact lost its majority status." Joan Flynn, *A Triple Standard at the NLRB; Employer Challenges to an Incumbent Union*, 1991 Wis. L. Rev. 653, 690 (1991) (hereinafter *"A Triple Standard"*). Flynn found no indication that "in the polling context . . . the standard is applied any differently than in the withdrawal of recognition context." *Id.* n.250. *See also* James D. Dasso, *Employer Postcertification Polls to Determine Union Support*, 84 Mich. L. Rev. 1770, 1771 and n.12 (1986); Joel B. Toomey, *Application of the Good-Faith-Doubt Test to the Presumption of Continued Majority Status of Incumbent Unions*, 1981 Duke L.J. 718 (1981).

[10] In *Liquid Carriers Corp.*, 319 N.L.R.B. 317, 319 n.10 (1995), *enf'd*, 101 F.3d 691 (3rd Cir. 1996), the Board, responding to criticism, stated that it "has never imposed a requirement that there be 'proof of express anti-union statements by each individual worker comprising a majority of the bargaining unit' in order for an employer to establish 'good faith doubt.' " However, the Board adhered to its view that "good faith doubt" means that "the evidence must establish with a reasonable

B. Polling.

The Board permits polling during the organizational phase to determine if a majority of employees support the union. "The purpose of the polling in these circumstances is clearly relevant to an issue raised by a union's claim for recognition and is therefore lawful." *Struksnes Construction Co.*, 165 N.L.R.B. 1062, 1063 (1967). As long as the polling conforms to certain procedural safeguards, the Board finds that it does not "interfere with, restrain, or coerce employees" in violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1). Safeguards for the conduct of such polls are set forth in *Struksnes*.[11]

Once a union has achieved recognition, or asserts a claim that it should be recognized by a successor, a different standard applies. In *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974), the Board held that an employer must have good faith doubt, based on objective considerations, as to the union's continuing majority status in order to conduct a poll. In practice, the Board requires proof that a majority of the workers no longer support

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degree of *certainty* that there is an objective basis for doubting that the majority of unit employees desire representation by the union." *Id.* at 320 (emphasis added). It is a contradiction in terms to speak of establishing "doubt" with "certainty."

[11] The safeguards are: (1) the purpose of the poll must be to determine the truth of a union's claim of majority; (2) the purpose must be communicated to employees; (3) assurances against reprisals must be given; (4) the poll must be by secret ballot; and (5) the employer may not engage in unfair labor practices or otherwise create a coercive atmosphere. *Struksnes Construction Co.*, 165 N.L.R.B. at 1063. A poll cannot be taken if a petition for a Board-conducted election is pending. *Id.*

the union. That is the same standard used to determine whether there is sufficient evidence to process an employer-filed decertification petition (RM petition) or to determine whether an employer can lawfully withdraw recognition from a union. *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1059 (1989), *remanded as modified*, 923 F.2d 398 (5th Cir. 1991).[12]

C. Judicial response to the Board's polling standard.

The Board's polling standard was rejected by the first three Courts of Appeals to consider it. *Mingtree Restaurant v. NLRB, supra; Thomas Industries v. NLRB, supra; NLRB v. A.W. Thompson, Inc., supra.*[13] The standard developed by those courts in effect revitalized the good faith doubt branch of the withdrawal of recognition standard, by allowing the employer to poll when it had reasonable grounds to believe the union had lost majority support, even if that evidence was not sufficient to prove actual loss of majority status.

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[12] When the union already has bargaining rights or a claim to bargaining rights with a successor employer, the employer must give the union advance notice of the poll. *Texas Petrochemicals Corp.*, 296 N.L.R.B. at 1063.

[13] In *Hajoca Corp.*, 291 N.L.R.B. 104 (1988), *enf'd*, 872 F.2d 1169 (3d Cir. 1989), the Board followed its strict standard. The Third Circuit found it unnecessary to address the conflict between the Board's and the Courts of Appeals' standards, since the evidence was insufficient to support a poll even under the courts' standard.

In *NLRB v. A.W. Thompson, Inc., supra,* the Fifth Circuit held, "we are not convinced that an employer may conduct an employee poll only when it has no actual need to do so, that is, when it already has sufficient objective evidence to justify withdrawal of recognition." 651 F.2d at 1144. The court found that the Board's approach "represents, in practical effect, an outright ban on employer-sponsored polls of employee sentiments in regard to a certified union." *Id.* Observing that "the national labor policy favors employee free choice in such matters," *id.*, the court concluded that if an employer has not otherwise engaged in unfair labor practices, or created a coercive atmosphere, it may, after giving notice to the union, "poll the employees for their union sentiment if there is other substantial, objective evidence of a loss of union support (even if that evidence is not sufficient by itself to justify withdrawal) and if the poll meets the procedural guidelines set out in *Struksnes.*" *Id.* at 1145.

In *Thomas Industries v. NLRB, supra,* the Sixth Circuit adopted the *A.W. Thompson* polling standard. The court rejected the Board's position that in order to conduct a poll, an employer must have objective evidence that over 50 percent of bargaining unit employees have rejected the incumbent union.

> We find the Board's position to be untenable. Under the Board's analysis, an employer would only be allowed to take a poll under circumstances where no poll was necessary; the only value of the poll would be to double check the employer's already sufficient evidence to refuse to bargain.

687 F.2d at 867.

The court further found that the evidence of loss of support should be considered cumulatively, and that the evidence in that case was sufficient to justify the poll. *Id.* The evidence presented included a sharp decline in dues check offs, negative comments from one-third of the employees, and resignations of union officials.[14]

In *Mingtree Restaurant, supra,* the Ninth Circuit agreed with the Fifth and Sixth Circuits. The court rejected the Board's argument that an employer-sponsored poll is defective because it does not have the safeguards of a Board-sponsored election.

> The Board has determined that the *Struksnes* procedures adequately protect employee interests in voting secrecy and assurance against employer reprisal in the organizational stage. Again, we see no reason why [these procedures] would not afford as much protection after the union has been recognized.

736 F.2d at 1298. The court also rejected the Board's argument that an employer-sponsored election usurps a Board function.

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[14] The court stated that Board-conducted decertification elections are preferable to employer-sponsored polls as a means of measuring employee sentiment, but noted a practical difficulty in obtaining such elections: the Board's rule permitting unions to block elections by filing unfair labor practice charges. 687 F.2d at 869, n. 3. In fact, it is easy for unions to delay decertification petitions even with meritless charges. *See Johns-Manville Sales Corp. v. NLRB,* 906 F.2d at 1431, n.9; Dasso, *supra* note 9, 84 MICH. L. REV. at 1782; William J. Rosenthal, *Issues in Decertification Proceedings,* 34 N.Y.U. CONF. LAB. 149, 158-59 (1982).

> After recognition of the union . . . as a practical matter . . . neither employer-petitioned Board elections nor private employer polls will be allowed until the employer first produces other evidence sufficient to permit withdrawal of recognition.

Id. The court continued:

> We find it incongruous for the Board to grant the right to conduct polls of union sentiment during the crucial organizational period and effectively deny that right after the union has been recognized. While we appreciate the importance of maintaining stability in the bargaining relationship, we must also weigh the legitimate concern of the employer that it bargain only with the majority union. On balance, we find that polling that adheres to the *Struksnes* safeguards is an adjunct to, rather than a usurpation of, a Board function; it is an objective, minimally disruptive mechanism for obtaining evidence of the level of union support; and it enables the employer to avoid precipitous action, such as the withdrawal of recognition, when only less precise evidence is available.

Id.

D. The Board adheres to its polling standard.

In *Texas Petrochemicals, supra,* a divided Board panel responded to the courts' criticism and reaffirmed its strict standard. Board Members Cracraft and Higgins explained that the more stringent standard is necessary to achieve

stability and avoid disrupting collective bargaining relationships. Board Chairman Stephens concurred in the result, but agreed with the courts that the standard for polling should be less than the standard for withdrawing recognition. 296 N.L.R.B. at 1065.

On review, the Court of Appeals for the Fifth Circuit refused to alter its view, expressed previously in *NLRB v. A.W. Thompson, supra,* that the Board's use of a single standard for withdrawals of recognition and employer polls was unreasonable. *Texas Petrochemicals Corp. v. NLRB,* 923 F.2d 398, 402 (5th Cir. 1991). The Ninth Circuit has also adhered to its earlier views. *Wagon Wheel Bowl, Inc. v. NLRB,* 47 F.3d 332, 335 (9th Cir. 1995).[15]

The Chief Justice and Justice Blackmun took note of the Board's *Texas Petrochemicals* ruling in *NLRB v. Curtin Matheson Scientific, supra.* The Chief Justice (concurring) observed:

> It appears that another of the Board's rules prevents the employer from polling employees unless it first establishes a good faith doubt of majority status. *See Texas Petrochemicals Corp.,* 296 N.L.R.B. 1057, 1064 (1989) (the standard for employer polling is the same as the standard for withdrawal of recognition). I have considerable doubt whether the Board may insist that good faith doubt be determined only on the basis of sentiments of individual employees, and at the

[15] The Court of Appeals for the Second Circuit also questioned the Board's policy in *NLRB v. Albany Steel, Inc.,* 17 F.3d 564, 571 (2d Cir. 1994) ("We are not the first court to notice the peculiar incentives that the Board's identical standards generate.")

same time bar the employer from using what might be the only effective means of determining those sentiments. But that issue is not before us today.

494 U.S. at 797.

Justice Blackmun, dissenting,[16] wrote:

I am also troubled by the fact, noted in the Chief Justice's concurring opinion, that while the Board appears to require that good faith doubt be established by express avowals of individual employees, other Board policies make it practically impossible to amass direct evidence of its workers' views.

494 U.S. at 800. Justice Blackmun continued, in a footnote:

The NLRB has recently reaffirmed its rule that an employer must meet the same good-faith doubt standard in order to poll its employees, petition the Board for an election, or withdraw recognition from the union. *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1064 (1989). If good-faith doubt can be established only by the express statements of individual workers, the employer is placed in a difficult bind. *See Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (CA9 1984) ("By the Board's reasoning, an employer in doubt of the union's majority status would be allowed to take a poll only when it had no actual need to do so, that is, when it

[16] Justice Blackmun was the author of the Court's decision in *Fall River Dyeing & Finishing, supra*, which contains a comprehensive review of labor law successorship doctrine.

already had sufficient objective evidence to justify withdrawal of recognition").

494 U.S. at 800, n.3.

E. The Court of Appeals' decision in this case.

The Court of Appeals' decision in this case was the first decision by a reviewing court to enforce the Board's standard. The Court of Appeals panel majority found that "Neither the courts' analysis nor the Board's response is entirely satisfactory." (Pet. App. 6). Discussing the Board's reasoning in *Texas Petrochemicals*, the court wrote, "it seems to us inconsistent for the Board to say that RM elections are the preferred method for testing employee support of the union, 296 N.L.R.B. at 1061, and yet maintain the same evidentiary standard for allowing polling." (Pet. App. 7.) Assuming the Board were correct that the same standard should apply to polling and RM elections, the court asked, "How then can the Board justify applying the identical standard to an employer's decision to withdraw recognition, a decision lacking any procedural safeguards?" (Pet. App. 8). Nevertheless, the Court of Appeals panel majority deferred to the Board's standard.

The majority decision provoked an exceptionally vigorous dissent. (Pet. App. 13). As the dissent recognized, the Board found that the employer lacked good faith doubt of the union's majority status despite persuasive evidence to the contrary and, as a result,

concluded not only . . . that the employer committed the unfair labor practice by refusing to bargain with a union that commanded thirteen of the thirty-two votes, but also placed the

> employer under a bargaining order amounting to a bar against decertification of the union with only 40% support.

(Pet. App. 14.)

The dissent continued by remarking that where, as here,

> an administrative agency's application of the law yields a bizarre result . . . that application of the law should be closely scrutinized, particularly when other courts have avoided that result. . . . The Board's rule establishing that an employer cannot conduct a poll to determine majority support unless it already has so much evidence of no majority support as to render the poll meaningless, is just such an application. Three other circuits who have examined this question have unanimously concluded that the Board's rule cannot stand.

(*Id.* at 14-15.)

After reviewing the manner in which the other courts of appeals avoided this "bizarre result" the dissent suggested that "the present case is, if anything, a stronger one for rejecting the Board's approach[.] . . . The emerging bargaining unit at Allentown Mack had never been- . . . sampled for majority support." (*Id.* at 17-18.) The dissent concluded that it was "arbitrary and capricious of the Board to find that the employer committed unfair labor practices in the face of overwhelming and unrefuted evidence that the union lacked majority support, including a poll taken with the utmost safeguards for fairness and objectivity." (*Id.* at 18.)

II. THE BOARD'S STANDARD IS IRRATIONAL AND CONTRARY TO THE ACT.

A. The standard of review.

The Board's rules are entitled to deference, provided they are rational and consistent with the Act. *NLRB v. Curtin Matheson Scientific, supra.* In this case, the Board's standard is neither. "Reviewing courts are not obligated to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions." *NLRB v. Brown,* 380 U.S. 278, 291 (1965).

B. The Board's polling standard is irrational.

No one would dispute that it is better for an employer which doubts a union's majority support to act on the basis of an uncoerced, secret ballot poll, than to unilaterally withdraw recognition. The Board, however, irrationally prescribes the same standard for polls as for unilateral withdrawals of recognition. This standard makes it possible to conduct polls only when they are unnecessary, and prohibits them when they would be most useful, i.e., when the employer has objective reasons to believe, but not necessarily conclusive proof, that the union has lost majority support.

The Board responds that the standard for employer sponsored polling should be consistent with the standard

for Board-conducted elections based on employer petitions (RM petitions). *Texas Petrochemicals*, 296 N.L.R.B. at 1060-61. However, the standard for RM petitions is also the same as the standard for unilateral withdrawals of recognition. *United States Gypsum*, 157 N.L.R.B. 652, 655 (1966). "It defies common sense to require an employer to prove that the union has lost its majority status before it can obtain an election designed to test that status." *A Triple Standard, supra* note 9, 1991 WIS. L. REV. at 690. In short, the Board defends one irrational policy by claiming a need to be consistent with another irrational policy.

C. The Board's polling standard is contrary to the Act.

The poll in this case was found to violate only Section 8(a)(1) of the Act. (Pet. App. 26, n. 9.)

The Board places no precondition on polling during the organizational phase, other than the requirement that the polling be conducted in accordance with *Struksnes* safeguards. On the other hand, the Board strictly limits polling when a union stands to lose bargaining rights. Thus, the polling mechanism is like a ratchet, which advances freely, but moves backwards only with great difficulty.

Under Section 8(a)(1), it is an unfair labor practice "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7."[17] Under

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[17] Section 7 protects only employee rights. Any rights that a union enjoys under Section 7 are derivative. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).

Section 7, the right to engage in collective bargaining, and the right to refrain from collective bargaining, are placed on the same footing. Nothing in Section 7 or Section 8(a)(1) warrants discriminating between polls in which unions stand to gain and polls in which they stand to lose.

Certified unions, are, of course, protected against withdrawals of recognition during the certification year and during the term of any contract reached. *Auciello Iron Works, supra*. After the certification year, a union claiming a right to bargain with a successor employer enjoys no such "conclusive presumption." The presumption that employees of a successor continue to support the union is rebuttable. *Harley-Davidson*, 273 NLRB at 1531.

The Board found in this case that the Company's poll complied with the *Struksnes* and *Texas Petrochemicals* procedural guidelines. In other words, the conduct of the poll did not in any way "interfere with, restrain, or coerce employees." The only problem with the poll was that it confirmed a doubt the Board did not want the employer to be able to prove – that a majority of the employees no longer supported the Union. Yet that fact was "clearly relevant to an issue raised by a union's claim for recognition." *Struksnes Construction Co.*, 165 N.L.R.B. at 1062. As a claimed successor, the Company had a right to withdraw recognition, if a majority of employees no longer supported the union. *Harley-Davidson Transportation, supra*.

In short, the information obtained from the poll was both relevant to the employer and obtained in accordance with all applicable procedural safeguards. There was, therefore, no statutory basis to prohibit it.

D. The Board's defense of its standard should be rejected.

The Board's fullest defense of its standard appears in *Texas Petrochemicals*. The Board's explanations for employing that test were as follows:

> *Since a poll and a decertification election are similar in purpose and consequences, similar evidence should be required.* 296 NLRB at 1060-61.

According to the Board, a poll and a decertification election are similar in purpose and consequences.

> It would be anomalous to on one hand require an employer to show sufficient objective considerations on which to base a reasonable doubt about an incumbent union's majority support in order to have a formal, Board conducted RM election for the purpose of determining the union's majority support, while, on the other hand permitting that same employer to conduct an in-house, relatively informal poll for the same purpose, with the same serious potential consequences for the union and the employees, on the basis of a significantly less stringent evidentiary predicate, i.e. the courts' "loss of support" standard.

Id. at 1060.

That argument should be rejected for several reasons:

First, while a poll and a Board-conducted election are similar in purpose, *they are not similar in consequences.* When a Board-conducted election is held, the union is statutorily barred from seeking another election for one year. NLRA Section 9(c)(3), 29 U.S.C. § 159(c)(3). An employer-sponsored poll, taken to determine if employees no longer support a union, has no such preclusive effect.[18] The union can file an election petition at any time.

Second, while it might make sense to have a similar standard for polls and Board-conducted elections (although they are different), it makes no sense for that standard to be the same as the standard for unilateral withdrawals of recognition. As this case illustrates, if the union loses a poll, the employer must defend its withdrawal of recognition by proving that the Union lacked majority support prior to the poll. Thus, the employer has nothing to gain by ascertaining its employees' views more precisely via a poll. At the same time, an employer which has genuine doubts (but not conclusive proof) that

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[18] If the union wins an employer-conducted poll, the employer is required to recognize the union. *Nationwide Plastics Co., Inc.*, 197 N.L.R.B. 996 (1972). When an employer voluntarily recognizes a union, the Board imposes a bar against decertification for a reasonable period to permit bargaining. *See Dale's Super Valu, Inc.*, 181 N.L.R.B. 698 (1970); *Keller Plastics Eastern*, 157 N.L.R.B. 583 (1966). If an agreement is reached, a contract bar will apply. *See Texas Petrochemicals*, 296 N.L.R.B. at 1061. Thus, the Board would give preclusive effect to employer-sponsored polls, but only if the union wins.

the union has lost support is barred, under the Board's standard, from taking any action.[19]

Statutory purposes and goals require a high standard. 296 N.L.R.B. at 1061-62.

The Board argues that "A principal purpose and ultimate goal of the Act is to promote industrial and workplace stability in collective bargaining relationships." *Id.* at 1061. Polls, the Board contends, are "potentially, if not inherently, both disruptive of the collective bargaining relationship between an employer and a union and also unsettling to the employees involved." *Id.* at 1061. Hence, the Board asserts, permitting employer polls would "allow an employer's interest in testing its employees' support for a union to outweigh the statutory goal of stable collective bargaining relationships." *Id.* at 1062 (footnote omitted). The interest of employers in not bargaining with a minority union is adequately protected by the availability of employee-filed decertification petitions (RD petitions), the Board continues. *Id.* at 1062.

Those arguments should be rejected for several reasons.

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[19] The Board's General Counsel has impliedly conceded that the Board's standards in this area are flawed: he recently proposed that the Board prohibit unilateral withdrawals of recognition and reduce the standard for RM petitions to a 30 percent showing of interest. *See* Brief of NLRB General Counsel in *Chelsea Indus., Inc.*, 7-CA-36846, 7-CA-37106 at 8-13, lodged by the United States with the Clerk of the Court on January 22, 1997. That proposal has not been adopted by the Board. In *Lee Lumber and Building Material Corp.*, 322 N.L.R.B. No. 14, 153 L.R.R.M. (BNA) 1159, 1161, n.14 (1996), the Board declined to address that suggestion.

First, as the results of this case make clear, the Board's policy places a higher value on the union's claim to continued recognition than on employee self-determination. The Act, however, gives equal weight to the right to engage in protected activity and the right to refrain from such activity. If stability in collective bargaining relationships were in fact the single "ultimate goal of the Act," the presumption of continued support by a successor's employees should be unrebuttable. The presumption is, in fact, rebuttable, because employee choice is at least as important as stability.

The Act itself makes this clear. The preamble declares its purpose to protect "the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing." NLRA § 1, 29, U.S.C. § 151. Section 7, the core of the Act, states that employees shall have the right to bargain collectively through representatives "of their own choosing" and "to refrain from any and all such activities." 29 U.S.C. § 157.

In this regard, the Company is not claiming to be its "workers' champion," *Auciello Iron Works*, 116 S. Ct. at 1760, although in fact its interests and the interests of a majority of its employees coincide. Rather, the Company seeks to protect its own right under the Act not to bargain with a minority union. That this interest coincides with the employees' interest in not being represented by a minority union is no accident – the law commands employers to bargain with representatives chosen by a majority of their employees and prohibits employers

from bargaining with others. *Int'l Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961).[20]

Second, the Board's concern that polls are themselves destabilizing is adequately addressed by the *Struksnes* safeguards and the requirement that the employer have a good faith doubt (even if that doubt is not sufficient to warrant unilateral withdrawal of recognition). No one suggests that employers should be permitted to illegally foment anti-union sentiment and then poll to confirm it. Rather, the question is whether an employer can poll after receiving, in the absence of any unfair labor practice or coercion, objective evidence to support a good faith doubt as to the union's continued majority support. Moreover, the safeguards of *Struksnes* and the advance notice required by *Texas Petrochemicals* assure the union an opportunity to prepare employees for the poll. Ultimately, if the union loses the poll, it is not because the employer has "destabilized" the situation; it is because employees (who are well familiar with the union based on past experience) no longer feel the need for the union's services.

Third, the policy of promoting "industrial stability" is addressed in the successorship context by providing a

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[20] Unlike *Auciello*, this case does not involve a certified union. 116 S. Ct. at 1760. The Union's claim to continued recognition rests solely on a presumption.

Furthermore, given that the poll at Allentown Mack was conducted in accordance with every safeguard against coercion, and the union was rejected, the Board has little basis to claim that it is advancing employee representational interests in this case. Clearly, the Board is, instead, advancing the Union's institutional interests.

presumption of continuing support. *Fall River Dyeing & Finishing*, 482 U.S. at 39-41. The law's solicitude for the union during the "unsettling transition period," however, has its limits. The presumption of continuing support is rebuttable. As Justice Blackmun, author of *Fall River Dyeing & Finishing*, pointed out in *Curtin Matheson*, the Board's standard makes it almost impossible for a new employer to amass the information necessary to make the rebuttal.

Moreover, the presumption of continuing majority status may rest, as in this case, on a weak empirical foundation. *See Fall River Dyeing & Finishing*, 482 U.S. at 58 (Powell, J., dissenting)("from the employee's perspective, there was little objective evidence that the jobs with petitioner were simply a continuation of those at [the predecessor.]") In this case, the old employer was a multinational corporation, while the new employer is an owner-managed fledgling enterprise. Employees accepted a pay cut to take jobs with the new Company (Tr. 340-41), and could have reasonably concluded that they had nothing to gain from putting any pressure on the employer, through collective bargaining and threats to strike. They could, however, obtain an immediate increase in take-home pay by not paying union dues.

Fourth, the Board argues that the availability of employee-filed decertification petitions, which require a 30 percent showing of interest, is adequate to protect employee interests in ridding themselves of a union they no longer support. *Texas Petrochemicals*, 296 N.L.R.B. at 1062. It is doubtful whether the availability of employee-filed petitions is in fact sufficient to protect employee

interests.[21] The Company is not, however, primarily seeking to vindicate its employees' rights (although it clearly has an interest in their well-being), but its own recognized interest in bargaining only with a union chosen by a majority of its employees. *Id.* at 1062.[22]

The reasonable doubt policy is not anomalous. 296 N.L.R.B. at 1063.

The Board rejected the courts' criticism that its policy was anomalous because it permitted polling only when it

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[21] Employees must figure out how to file timely and properly supported decertification petitions without assistance from the employer or an organizer. *Shengo Steel Buildings*, 231 N.L.R.B. 586 (1977); *Consolidated Rebuilders Inc.*, 171 N.L.R.B. 1415 (1968). Employees who try to decertify their union are subject to pressure from the union, including the threat of union discipline. *Int'l Molders & Allied Workers Union*, 178 N.L.R.B. 208 (1969), *enf'd*, 442 F.2d 92 (7th Cir. 1971). A decertification petition can be easily blocked by the filing of even meritless unfair labor practice charges. *Thomas Industries v. NLRB*, 687 F.2d at 869, n.3; *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d at 1431 (decertification petition blocked for 9 years). *See generally*, Rosenthal, *supra*, note 14, 34 N.Y.U. CONF. LABOR. at 153-56.

[22] In *Auciello Iron Works, supra*, the Court suggested that an employer with a good faith doubt of a union's majority status could, among other alternatives, bargain with the union while investigating whether the doubts were bona fide. 116 S. Ct. at 1759. In doing so, the employer could avoid the conundrum of learning, after a binding contract had been reached (and a contract bar triggered) that the union lacked majority support. Since it is illegal to interrogate employees concerning their union sympathies, *e.g. Cannon Elec. Co.*, 151 N.L.R.B. 1465 (1965), it would appear that the only – and certainly the best – way for the employer to investigate would be to conduct a secret ballot poll. Yet, under the Board's standard, the employer could investigate only if the results were a foregone conclusion.

was of no value. The Board found that some employers might wish to conduct a poll, even if they already had evidence sufficient to permit a withdrawal of recognition, in order to resolve the issue. "An employer may wish first to poll its employees to obtain more certain, precise information about the union's support than is provided by its own reasonable doubt." 296 N.L.R.B. at 1063.[23]

Perhaps aware that permitting polls during the organizational stage, while banning them outright once a union has gained bargaining rights, would be too obviously one-sided, the Board takes pains to disclaim any intention to outlaw polls to determine support for incumbent unions. "To impose such procedural requirements on in-house employer polls would, in all likelihood, effectively do away with such polls – a result we do not seek." *Texas Petrochemicals*, 296 N.L.R.B. at 1061. Nevertheless, the Board effectively bans polls by permitting them only when they are of no real value, and denying them when they would be of value. The Board's suggestion that employers might wish to conduct polls to verify their already sufficient evidence that the employees no longer support the union is unrealistic. If the union loses the poll, the employer will still have to defend its withdrawal of recognition by proving that it had sufficient evidence, even before the poll, that the union lacked majority support. Under the circumstances, the employer has nothing to gain by taking the poll. *See NLRB v. Albany Steel*, 17

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[23] That would appear to be exactly what the Company did in this case. The Board did not, however, recognize the Company's reasonable doubt as being something different from a head count proving actual loss of support.

F.3d at 571 (observing no employer incentive to request an election).

III. THE BOARD'S APPLICATION OF ITS STANDARD IS INCONSISTENT WITH BOARD PRECEDENT.

A. The standard of review.

An administrative agency's application of its rules must be consistent with its own precedent and rulemaking. *NLRB v. Curtin Matheson Scientific*, 494 U.S. at 799, n.2 (Blackmun, J., dissenting). *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 57 (1983)("an agency changing its course must supply a reasoned analysis."); *Calif. v. FCC*, 39 F.3d 919, 925 (9th Cir. 1994)("We therefore may require the agency to provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."), *cert. denied*, 115 S. Ct. 1427 (1995); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

B. The Board silently abandoned its good faith doubt standard.

As explained previously, the Board's own articulated standard for withdrawal of recognition has two branches: good faith doubt or proof of actual loss of majority status. Although the Board continues to use the phrase, good faith doubt, its application of that test has effectively abolished doubt as a standard. Instead, the Board requires proof, via a head count, that a majority of

employees do not support the union. By contrast, the standard adopted by the Fifth, Sixth and Ninth Circuits gives effect to the Board's good faith doubt standard, by allowing polling when there is sufficient evidence to reasonably doubt the union's continuing majority support, even if the evidence is not sufficient to prove actual loss of support.

The Board has long held that an employer can rebut the presumption of majority support "either by showing that the union in fact lacks majority support or by demonstrating a sufficient objective basis for doubting the union's majority status." *NLRB v. Curtin Matheson Scientific*, 494 U.S. at 787. The two branches of this standards are supposed to be different. *See e.g., Stormor, Inc.*, 268 N.L.R.B. 860, 866-867 (1984)(employer need not show actual loss of majority support to prove good faith doubt). The good faith doubt test is not supposed to require proof via a head count, but is supposed to be based on circumstantial evidence, considering the totality of the circumstances. *Celanese Corp.*, 95 N.L.R.B. at 673.

As the Board's decision in this case illustrates, the Board has effectively abolished the good faith doubt branch of the standard without admitting it. However, the Board's effective abandonment of the good faith doubt standard has not gone unnoticed.

> [B]y requiring direct proof of employee dissatisfaction, the Board limits the availability of the good faith doubt defense to instances where dissatisfied employees come forward and identify themselves in sufficient numbers to constitute an absolute majority. Such an approach

> leaves little of the good faith doubt rule, effectively collapsing it into the proof in fact rule.

Johns-Manville Sales Corp., 906 F.2d at 1432-33. *See NLRB v. Curtin Matheson Scientific*, 494 U.S. at 797 (Rehnquist, C.J., concurring); *Hiding the Ball*, 75 B.U.L. Rev. at 394.

The Board has never overruled the good faith reasonable doubt test, and its failure to apply it to employee polling, for that reason, is an impermissible departure from its own precedent. *NLRB v. Curtin Matheson Scientific*, 494 U.S. at 799, n.2 (Blackmun, J., dissenting). If, as the Board asserts, good faith reasonable doubt is the test applicable to polling (as well as withdrawals of recognition), it should not have insisted on a strict head count. The Company should have been permitted to conduct a poll based on evidence raising reasonable doubts that a majority of employees continued to support the Union, even if that evidence did not amount to proof of actual loss of majority status.

IV. MEASURED AGAINST THE CORRECT STANDARD, THE COMPANY HAD A REASONABLE, OBJECTIVE BASIS FOR CONDUCTING A POLL.

Neither the Board nor the Court of Appeals considered the evidence under a standard requiring anything less than strict proof that a majority of employees individually expressed views in opposition to the Union.[24]

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[24] The ALJ expressed doubt that the evidence would satisfy the courts' standard, but made no effort to apply that standard. "As this standard is not the standard used by the Board, and as I am bound to follow Board law, the evidence will not be further discussed in relation to the courts' standard." (Pet. App. 53, n.7). While the Board, in a footnote, attempted to elevate the ALJ's "doubt" to an alternative finding that the evidence was insufficient under the courts' standard, the Board treated the head count, rather than the totality of the evidence, as determinative. (*Id.* at 26, n.9.). The Court of Appeals made no ruling under the less strict standard. *Compare, Hajoca Corp. v. NLRB*, 872 F.2d at 1169.

Lechmere, Inc. v. NLRB, 502 U.S. 527, 539 (1992) ("We cannot accept the Board's conclusion, because it 'rest[s] on erroneous legal foundations.' ") Measured against a reasonable doubt standard, Allentown Mack had sufficient evidence to justify its poll.

Allentown Mack hired 32 employees. Six or seven of those employees made statements that even the Board accepted as evidence they no longer supported the union.

Mohr was shop steward for the service department, in which 23 of the Company's 32 employees worked, and was a member of the Union's bargaining committee. He accurately predicted that "with a new company, if a vote was taken, the Union would lose and that it was his feeling that the employees did not want a union." (Pet. App. 53.)

The Board discounted Mohr's statement on the grounds that Mohr was referring to the seller's existing employee complement, not the purchaser's complement, which included 32 of the seller's 45 employees. That is simply illogical. If union support carries forward based on a representative complement of employees, *Fall River*

Dyeing & Finishing, supra, non-support should also carry forward on the same basis.[25]

The Board also discounted Mohr's statement on the grounds that he was shop steward only for the service department, although that department contained 23 of the new Company's 32 employees, and that Mohr "had no more basis than any other employee for reporting the union sentiment of employees in the parts department." (Pet. App. 24.) In so finding, the Board overlooked the fact that the employer had a small workforce and that Mohr served on the Union's negotiating committee in both the most recent contract negotiations and in bargaining with the seller over the effect of the sale. These roles put him in a good position to assess (accurately, as it turned out) the sentiment of the workforce.[26] *American Mirror Co.,* 277 N.L.R.B. 1626 (1986)(Employer lawfully polled employees after receiving signed rejections of union from minority of employees and statements from others "that if an election were held a majority of employees would reject union representation."), *Naylor, Type & Mats,* 233 N.L.R.B. 105 (1977)(employer permitted to rely on statements by employees concerning union sentiment in departments).

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[25] As the dissent in the Court of Appeals pointed out, the emerging bargaining unit at the Company was smaller than the predecessor unit and had never been sampled for majority support. (Pet. App. 18).

[26] The Court of Appeals approved the ALJ's characterization of Mohr's statement as an "unverified assertion." (Pet. App. 11, 55). The poll, of course, was the only method available to the Company to verify the assertion, which turned out to be correct.

The Board's treatment of other evidence was also unrealistic and result-oriented.

Ridgick stated that as long as the new Company would treat them right, there was no need for the Union. The Board discounted this statement because Ridgick was a manager (interviewing for a bargaining unit job), as if that automatically meant that Ridgick was insincere. (Pet. App. 48.) However, Ridgick questioned management about decertifying the Union in 1986 when he was a member of the bargaining unit, which suggests that his views were consistent. In any event, the Board's speculation about the sincerity of Ridgick's comment is unwarranted – the question should not be whether Ridgick's statement proved conclusively that he did not support the Union, but whether it raised a reasonable doubt.[27]

Wehr stated in July 1990, that if Dwyer were elected principal of a new company, "we didn't have to have a union because we didn't need one." (Pet. App. 49.) The Board refused to count Wehr because he quit on January 23, 1991, before the January 25, 1991 letter to the Union. On the other hand, Zoltack's statement that the Union was a waste of $35 was not counted because he was hired in February, before the poll but after January 25, 1991.[28]

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[27] "[T]he burden upon the employer here was not to demonstrate 100% assurance that a majority of the bargaining unit did not support the union, but merely 'reasonable doubt' that they did so." *NLRB v. Curtin Matheson Scientific,* 494 U.S. at 812 (Scalia, J., dissenting). *See also NLRB v. Oil Capital Electric, Inc.,* 5 F.3d 459 (10th Cir. 1993)(evidence should be viewed from employer's perspective).

[28] Thus, being on the payroll on January 25, 1991 was the critical date for having one's views considered, regardless of

Marsh said he was not being represented for the $35 he was paying. The Board discounted Marsh based on the improbable speculation that his statement "seems more an expression of a desire for better representation than one for no representation at all." (Pet. App. 51.) "But what the employer is required to have a good-faith doubt about is majority support, not for 'union representation' in the abstract, but for representation *by this particular complainant union, at the time the employer withdrew recognition from the union.*" *Curtin Matheson Scientific*, 494 U.S. at 808 (Scalia J., dissenting)(emphasis in original).

Bloch, a night shift employee, told the Company that the entire night shift (5 or 6 employees) did not want the union. The Board counted Bloch as anti-union, but gave no weight to his statement concerning other employees, on the grounds that there was not a sufficient foundation. (Pet. App. 51). Taken in context, however, it adds to the Company's reason for doubting the Union's continuing support. *American Mirror Co., supra; Naylor, Type & Mats, supra.*

The Board viewed each piece of evidence in isolation, rather than combining them to see the big picture. It grudgingly counted an employee as opposed to the Union only if it could find no excuse for questioning the reliability of the employee's statement. While the Court of Appeals sustained the Board's factual findings, it, like the Board, viewed the evidence through the filter of the Board's strict standard. As the dissent in the Court of

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prior or subsequent service. There is no reason to treat January 25, 1991 as the critical date; it merely marked one event (the letter) in the "totality of the circumstances."

Appeals found, when the evidence is viewed under a standard that permits polling based on substantial, objective evidence of a loss of union support, there was sufficient evidence to warrant a poll.

CONCLUSION

For these reasons, Allentown Mack respectfully requests that the Court reverse the decision of the United States Court of Appeals for the District of Columbia Circuit and remand with instructions to deny the Board's application for enforcement.

Respectfully submitted,

EARLE K. SHAWE*
STEPHEN D. SHAWE
ERIC HEMMENDINGER
ELIZABETH TORPHY-DONZELLA
SHAWE & ROSENTHAL
Sun Life Building
20 S. Charles Street
Baltimore, MD 21201
(410) 752-1040

* *Counsel of Record*

April 1997

No. 96-795

In the Supreme Court of the United States

OCTOBER TERM, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

WALTER DELLINGER
Acting Solicitor General
LAWRENCE G. WALLACE
Deputy Solicitor General
JONATHAN E. NUECHTERLEIN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel
LINDA SHER
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner committed an unfair labor practice by polling its employees about their continued support for their union when petitioner did not have a good-faith reasonable doubt as to the union's majority status.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 83 F.3d 1483. The decision and order of the National Labor Relations Board (Pet. App. 19-27), and the decision of the administrative law judge (Pet. App. 28-64), are reported at 316 N.L.R.B. 1199.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1996. A petition for rehearing was denied on September 13, 1996. Pet. App. 66-67. The petition for a writ of certiorari was filed on November 19, 1996,

and was granted on March 3, 1997 (J.A. 65). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 9(a) of the National Labor Relations Act (Act), 29 U.S.C. 159(a), provides, in relevant part, that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit." To enforce that guarantee, Congress enacted Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," and Section 8(a)(1), 29 U.S.C. 158(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, among which is the right of employees "to bargain collectively through representatives of their own choosing." 29 U.S.C. 157. Congress assigned the principal authority to implement those and other provisions of the Act to the National Labor Relations Board (Board). See, *e.g.*, *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990).

The Board has adopted, and this Court has upheld, several presumptions concerning the continued majority status of a union once it has been "designated or selected for the purposes of collective bargaining by the majority of the employees" in an appropriate bargaining unit. First, "[a] union 'usually is entitled to a conclusive presumption of majority status for one year following' Board certification as such a representative." *Auciello Iron Works, Inc.* v. *NLRB*, 116 S. Ct. 1754, 1758 (1996) (quoting *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37 (1987)); see also *Curtin Matheson*, 494 U.S. at 777-778; *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 279 & n.3 (1972); *Brooks* v. *NLRB*, 348 U.S. 96, 98-99 (1954). A union is entitled to the same conclusive presumption of majority status "during the term of any collective-bargaining agreement, up to three years." *Auciello Iron Works*, 116 S. Ct. at 1758; see also *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 343 n.8 (1978); *Burns*, 406 U.S. at 290 n.12. After the end of the first year following certification, or after the expiration of a collective-bargaining agreement, the presumption of a union's majority status continues, but becomes rebuttable. *Auciello Iron Works*, 116 S. Ct. at 1758; see also *Curtin Matheson*, 494 U.S. at 778; *Fall River*, 482 U.S. at 38; *Brooks*, 348 U.S. at 98.

As this Court has affirmed, these presumptions "'are based not so much on an absolute certainty that the union's majority status will not erode' * * * as on the need to achieve 'stability in collective-bargaining relationships.'" *Auciello Iron Works*, 116 S. Ct. at 1758 (quoting *Fall River*, 482 U.S. at 38). The presumptions promote such stability in two ways. First, "they enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified." *Fall River*, 482 U.S. at 38. Second, they "remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees." *Ibid.*; see also *Auciello Iron Works*, 116 S. Ct. at 1758; *Brooks*, 348

U.S. at 100. "The upshot of the presumptions is to permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace." *Fall River*, 482 U.S. at 38-39. "The rationale behind the presumptions is particularly pertinent" in the "successorship" context: where, as in this case, a "new employer is * * * a successor of the old employer and the majority of its employees were employed by its predecessor." *Id.* at 39, 41; see note 2, *infra*.

b. "Under the Board's longstanding approach," once a union's presumption of majority status becomes rebuttable, an employer may rebut that presumption by showing that "either (1) the union did not *in fact* enjoy majority support, or (2) the employer had a 'good-faith' doubt, founded on a sufficient objective basis, of the union's majority support." *Curtin Matheson*, 494 U.S. at 778. An employer with a "good-faith reasonable doubt" about the union's majority status has several options. First, under the Board's existing regulatory approach, the employer may withdraw recognition from the union unilaterally and refuse to bargain with it; in response, the union may seek an unfair-labor-practice proceeding before the Board to determine whether the employer's action was in fact bona fide and based on objective considerations sufficient to justify a reasonable doubt that the union continued to have majority support. See generally *Celanese Corp. of America*, 95 N.L.R.B. 664, 672 (1951); *Terrell Mach. Co.*, 173 N.L.R.B. 1480 (1969), enforced, 427 F.2d 1088 (4th Cir.), cert. denied, 398 U.S. 929 (1970); see also *Curtin Matheson*, 494 U.S. at 778; *Brooks*, 348 U.S. at 104. Second, under Section 9(c)(1)(B) of the Act, the employer may petition the

Board to conduct an election under Board supervision; such "representation" elections sought by "management" are known as "RM" elections. See 29 U.S.C. 159(c)(1)(B); *United States Gypsum Co.*, 157 N.L.R.B. 652, 656 (1966); see also *NLRB* v. *Financial Institution Employees*, 475 U.S. 192, 198 (1986). To obtain such an election, an employer must meet the same standard applicable to withdrawal of recognition from a union: it must "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." *Ibid.* (quoting *United States Gypsum*, 157 N.L.R.B. at 656).

The Board currently recognizes a third option available to an employer with a good-faith reasonable doubt about a union's majority status: an informal poll of the employees, sponsored by the employer itself, to determine their continued support for the union. The Act itself, however, does not specifically address the subject of employer polls. The issue in this case is whether the Board, in the exercise of its authority to interpret the Act's general provisions—and particularly Sections 8(a)(1), 8(a)(5), and 9(a)—has reasonably concluded that an employer violates the Act by polling its employees if, before conducting the poll, the employer lacks a good-faith reasonable doubt as to the union's majority status.

c. The Board first articulated its polling standard 23 years ago in *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974). In that case, the Board held that an employer violates Section 8(a)(5) of the Act by conducting a poll "without objective considerations casting doubt on the [union's] majority status." *Ibid.* The Board explained that, "[i]n order to minimize the interruption and impairment of a bargaining relation-

ship," and to prevent "a recalcitrant employer * * * from keeping the bargaining relationship in a recurrent state of turbulence by periodically compelling the union to reestablish its majority," the Board will not entertain an employer's election petition unless the employer can demonstrate a reasonable ground, based on objective considerations, for believing that the union has lost its majority status. *Id.* at 723-724. The Board concluded that it would be anomalous to allow an employer to conduct a poll where, because it lacks a reasonable basis for believing that the union has lost its majority status, the employer could not have secured an RM election. *Id.* at 724-725. "If the Board would not have conducted an election there is no basis for accepting the results of a private poll conducted by the employer without the advantages of impartial supervision and without the many Board safeguards designed to insure a fair election." *Id.* at 724.

The Board again addressed employer polling in *Jackson Sportswear Corp.*, 211 N.L.R.B. 891 (1974). There, the Board held that, in addition to violating Section 8(a)(5) of the Act, an employer violates Section 8(a)(1) by conducting a poll "at a time when it [does] not possess sufficient objective evidence to have entertained a reasonable doubt of the incumbent [u]nion's continuing majority status." *Id.* at 891 n.3. The Board explained that, where an employer conducts a "private 'election' in the absence of a good-faith doubt of majority and of objective considerations sufficient to warrant a reasonable and good-faith doubt," the employer impermissibly interferes with the representative status of the employees' chosen bargaining agent "at a time when, for reasons of industrial stability," the Board would not have granted

a petition for an RM election. *Id.* at 907; accord *Hutchison-Hayes Int'l, Inc.*, 264 N.L.R.B. 1300, 1304 (1982) (employer poll conducted without a good-faith reasonable doubt of majority status "independently violates Section 8(a)(1), because it deprives employees of stability in their choice of a representative").

d. During the 1980s, three courts of appeals invalidated the Board's polling standard, principally on the ground that that standard is, but should not be, the same as the standard governing an employer's unilateral withdrawal of recognition from a union. In *NLRB* v. *A.W. Thompson, Inc.*, 651 F.2d 1141 (1981), the Fifth Circuit held that, under the Board's rule, "an employer may conduct an employee poll only when it has no actual need to do so, that is, when it already has sufficient objective evidence to justify withdrawal of recognition." *Id.* at 1144. Instead of remanding the matter to the Board for reexamination of its regulatory scheme, the court invented and imposed a polling standard lower than the Board's, holding that, "when an employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere, it may * * * poll the employees for their union sentiment if there is other substantial, objective evidence of a loss of union support (even if that evidence is not sufficient by itself to justify withdrawal [of recognition])." *Id.* at 1145 (internal quotation marks and footnote omitted).

Similarly, in *Thomas Industries, Inc.* v. *NLRB*, 687 F.2d 863 (1982), the Sixth Circuit stated that, "[u]nder the Board's analysis, an employer would only be allowed to take a poll under circumstances where no poll was necessary," and, following *A.W. Thompson*, held that "an employer may poll its employees to determine their union sentiment if it has substantial,

objective evidence of a loss of union support, even if that evidence is insufficient in itself to justify withdrawal." *Id.* at 867. Finally, in *Mingtree Restaurant, Inc.* v. *NLRB*, 736 F.2d 1295 (1984), the Ninth Circuit also adopted the "loss of support" standard for polling (*id.* at 1299); it viewed the Board's standard as "tantamount to an outright prohibition of employer-sponsored polls." *Id.* at 1297.

In *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989), remanded as modified, 923 F.2d 398 (5th Cir. 1991), however, the Board addressed this judicial criticism and reaffirmed its polling standard, which (unlike the courts' standard) turns not on whether a union has suffered some degree of "loss of support," but on whether, at the time the poll was announced, the employer had a good-faith reasonable doubt that the union had retained the support of a majority of employees. The Board determined that the latter standard is more consistent with the ultimate goal of the Act—to promote industrial stability in collective-bargaining relationships—than is the less stringent "loss of support" standard. *Id.* at 1061. Polls, the Board explained, are "potentially, if not inherently, both disruptive of the collective-bargaining relationship between an employer and a union and also unsettling to the employees involved," for the very act of "[s]ubmitting a union's role as representative to an employer-initiated and conducted employee referendum raises simultaneously a challenge to the union in its role as representative and a doubt in the mind of an employee as to the union's status as his bargaining representative." *Id.* at 1061-1062. The courts' less stringent polling standard would have the effect of "expand[ing] the range of circumstances under which

employees could be subjected to such potentially disruptive polling." *Id.* at 1062.[1]

The Board acknowledged that, because the Act bars employers from negotiating with minority unions, an employer has legitimate interests "in avoiding continued recognition of an incumbent union that no longer has the support of a majority of the employees it represents and, vice versa, in avoiding withdrawal of recognition from an incumbent union that still does have such majority support." *Texas Petrochemicals*, 296 N.L.R.B. at 1062. The Board explained, however, that the rebuttable presumption of continued majority status enjoyed by an incumbent union "effectively insulates an employer against an allegation that it is unlawfully recognizing a minority incumbent union, and it also effectively relieves an employer of any obligation it might feel to withdraw recognition from an incumbent union whose majority support is doubted by the employer." *Ibid.*

The Board emphasized that its polling standard does not abridge the right of *employees* to choose for themselves whether or not to be represented by a union for purposes of collective bargaining. No matter what the standard for *employer*-sponsored polls may

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[1] The Board added that "[i]t would be anomalous to on one hand require an employer to show sufficient objective considerations on which to base a reasonable doubt about an incumbent union's majority support in order to have a formal, Board-conducted RM election * * * while on the other hand permitting that same employer to conduct an in-house, relatively informal poll for the same purpose, with the same serious potential consequences for the union and the employees, on the basis of a significantly less stringent evidentiary predicate, i.e., the courts' 'loss of support' standard." *Texas Petrochemicals*, 296 N.L.R.B. at 1060.

be, the Board noted, employees have the means "to rid themselves of an incumbent representative that is no longer supported by the majority" by obtaining "a decertification election upon a petition * * * supported by at least 30 percent of the unit employees." *Texas Petrochemicals*, 296 N.L.R.B. at 1062; see 29 U.S.C. 159(c)(1)(A)(ii); 29 C.F.R. 101.18(a).

2. This case involves the lawfulness of an employer-sponsored poll conducted at a time when, in the Board's determination, the employer lacked a good-faith reasonable doubt concerning the majority status of an incumbent union. On December 5, 1990, petitioner purchased a truck sales and repair facility in Allentown, Pennsylvania, from Mack Trucks, Inc. (Mack). Since 1973, Mack had recognized Local Lodge #724, International Association of Machinists, AFL-CIO (the Union), as the exclusive representative of a bargaining unit of service department mechanics and parts department employees at the Allentown facility. Mack ceased operations at the facility on December 20; petitioner began operations there on December 21. Pet. App. 29, 30, 32. By January 1, 1991, petitioner had hired 32 employees into the bargaining unit, all of whom had been employed by Mack on the date it ceased operations. *Id.* at 39-40.

On January 2, 1991, the Union asked petitioner to recognize it as the bargaining representative of the unit employees and to begin negotiations for a contract covering those employees. Pet. App. 35. On January 25, however, petitioner rejected that request. Petitioner asserted that "[t]here is a good faith doubt as to support of the Union among the employees hired by the Company," and it informed the Union that, "[i]n order to avoid possible protracted and unproductive dispute over this issue," petitioner would arrange

for an "independent poll" of the employees in the bargaining unit on February 8. *Id.* at 43. At the poll, 13 employees cast ballots for representation by the Union, and 19 cast ballots against the Union. *Id.* at 44. Petitioner based its claim of a good-faith reasonable doubt concerning the Union's level of support on various statements made over time by employees to members of Mack's and petitioner's management. *Id.* at 9-12, 21 n.4, 22-24, 46-55; see also Pet. Br. 3-4, 35-38.

3. On March 27, 1991, acting on unfair-labor-practice charges filed by the Union, the General Counsel of the Board filed a complaint against petitioner. Pet. App. 28. An administrative law judge (ALJ) concluded that petitioner had committed an unfair labor practice by taking the poll and then, based on the results, refusing to recognize and bargain with the Union, *id.* at 28-64, and the Board agreed, *id.* at 19-27.

a. The ALJ initially concluded that petitioner was a successor employer to Mack and was therefore presumptively obligated to recognize and bargain with the Union, which enjoyed a rebuttable presumption of continued majority status in the bargaining unit after petitioner began operations. Pet. App. 32 n.4, 38-42. The ALJ then applied the Board's polling standard, which, as noted, permits an employer to conduct a poll of its employees to test an incumbent union's continued majority support only if the employer has "a good-faith reasonable doubt, based upon objective considerations, of the continuing majority status of the [u]nion before conducting the poll." *Id.* at 45 (citing *Texas Petrochemicals Corp.*, *supra*).

After examining the evidence that petitioner cited to support its reasonable-doubt claim, the ALJ found that, as of January 25, 1991, only six or seven of the 32

employees in the bargaining unit (or approximately 20% of the unit) had clearly indicated that they no longer wished to be represented by the Union. Pet. App. 52. That quantum of evidence, the ALJ concluded, was insufficient, without more, to constitute "an objective reasonable doubt of union majority support," and therefore did not justify the poll subsequently conducted by petitioner. *Id.* at 52-53. Indeed, the ALJ added, petitioner's evidence might not even have supported a poll under the less stringent "loss of support" standard adopted by the Fifth, Sixth, and Ninth Circuits. *Id.* at 53 n.7; see pp. 7-8, *supra*. The ALJ recommended that the Board order petitioner, among other things, to recognize and, upon request, bargain with the Union. Pet. App. 62-63.

b. With certain modifications not relevant here, the Board adopted the ALJ's recommended order and affirmed his findings and conclusions. Pet. App. 19-27. A majority of the Board agreed that petitioner had lacked a reasonable doubt concerning the Union's majority status when it conducted the poll, and that, under *Texas Petrochemicals*, petitioner therefore lacked authority to take the poll. *Id.* at 25-26. The Board also held, in the alternative, that petitioner's evidence was "insufficient" to meet even the "loss of support" standard. *Id.* at 26 n.9. Board Member Stephens agreed that petitioner's evidence did not satisfy that latter standard and would have affirmed the ALJ's findings on that basis alone. *Ibid.*

4. A divided panel of the court of appeals enforced the Board's order and upheld the Board's polling standard. Pet. App. 1-18. The court acknowledged that the Fifth, Sixth, and Ninth Circuits had rejected that standard, but it disagreed with the analysis of those courts. *Id.* at 4 & n.1, 8. The court observed that,

even if the other courts' "basic proposition" were correct—"that the standard for polling should be lower than the standard for withdrawal of recognition"—that proposition would not necessarily lead to the conclusion that the Board's polling standard should be relaxed. *Id.* at 6. The same objective, the court noted, could be accomplished (for example) "by raising the Board's withdrawal-of-recognition standard." *Ibid.* The court also noted that the other courts of appeals that have rejected the Board's polling standard have created a different anomaly, by "making it easier for an employer to conduct an unsupervised poll than to have a Board-supervised RM election." *Ibid.*

The court found this to be an area in which deference to the Board's policy decisions is appropriate, because "[n]othing in the National Labor Relations Act specifically governs [employer polling]." Pet. App. 7. Recognizing the Board's concern that polling employees about their support for an incumbent union is "potentially, if not inherently, both disruptive of the collective-bargaining relationship * * * and also unsettling to the employees involved" (*ibid.*, quoting *Texas Petrochemicals*, 296 N.L.R.B. at 1061), the court concluded that, "[i]n light of these dangers, the Board, in its expert judgment, reasonably limited the circumstances in which employers may conduct polls," *ibid.* "Nothing we have seen," the court added, "justifies our disregarding the Board's choice and replacing it with a judicially-created lower standard for polling." *Id.* at 8.

Applying the Board's "reasonable doubt" standard, the court agreed with the Board that petitioner had failed to meet that standard in this case. Pet. App. 9-12. The court sustained, as supported by substantial evidence, the Board's finding that petitioner lacked a

reasonable doubt about the Union's majority status on January 25, 1991—the date on which it refused to recognize the Union and announced it would poll the employees—because, on that date, petitioner had objective reason to believe that "only 7 of the 32 employees had repudiated the [U]nion." *Id.* at 12; see *id.* at 9.

Judge Sentelle dissented. Pet. App. 13-18. He agreed with the reasoning of the courts of appeals that have disapproved the Board's polling standard, and he further suggested that the record demonstrated "overwhelming objective evidence of the loss of majority support" for the union. *Id.* at 18.

SUMMARY OF ARGUMENT

"The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees." *Auciello Iron Works, Inc.* v. *NLRB*, 116 S. Ct. 1754, 1758 (1996). Employer-sponsored polling of employees to determine their continued support for an incumbent union threatens that statutory objective because it throws "the bargaining relationship in[to] a recurrent state of turbulence by periodically compelling the union to reestablish its majority." *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 723-724, (1974). Thus, so long as the Board permits such polls, it may reasonably limit their use to circumstances in which an employer in fact has a "good-faith reasonable doubt," based on objective evidence, concerning whether a union has the support of a majority of employees. In the absence of such a showing, the Board has reasonably relied on employees, whose interests are most directly at stake, to

decide for themselves whether to test their union's continued majority status.

Petitioner claims that the Board's polling standard is "contrary to the Act" on the theory that, in adopting that standard, the Board has exceeded the scope of its authority under Section 8(a)(1) to prohibit labor practices that "interfere with, restrain, or coerce employees" in the exercise of their collective bargaining rights. 29 U.S.C. 158(a)(1). That claim is improperly presented here, however, for two independent reasons. First, because petitioner did not raise that claim either in the court of appeals or in the petition for certiorari, and because the court of appeals did not in fact address it, this Court too should decline to consider it. Second, petitioner has not challenged the Board's independent and long-exercised authority—which the Board failed to employ in this case only because of an omission in the complaint—to base its polling standard on Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5). In any event, petitioner's claim that the Board has acted beyond the scope of its authority under Section 8(a)(1) is without merit: The Board has reasonably determined that employer-sponsored polling, unjustified by an objectively reasonable doubt about an incumbent union's majority status, does in fact impair employees' collective-bargaining rights in violation of that provision.

Petitioner also contends (Br. 10) that, "[a]lthough the Board continues to cite the words of the good faith doubt" standard, "it has in practice eliminated [that standard] in favor of a strict head count" proving an actual loss of majority support; for that reason, petitioner argues, that standard, in application, renders polls "superfluous." That assertion is incorrect. The

Board's decisions make clear that an employer may well have reasonable grounds for doubting a union's majority status, and may accordingly poll its employees to test that status, even if, before conducting the poll, it does not have proof that the union has in fact lost the support of a majority of the bargaining-unit employees. In any event, petitioner's argument misses the mark: If, in particular cases, the Board has misapplied its own polling standard, the appropriate remedy is to remand such cases to the Board for reasoned application of that standard, not to invalidate the standard itself. The record in this case confirms that the Board properly applied its standard here and that petitioner did indeed lack an objective basis for doubting the majority status of the Union at the time the poll was announced.

Finally, like several courts of appeals that have addressed the issue, petitioner challenges the Board's polling standard on the related but distinct ground that the Board acted irrationally in making that standard identical to the standard governing the lawfulness of an employer's unilateral withdrawal of recognition from a union. That argument is also without merit. Because an employer can have a reasonable doubt about a union's majority status without knowing that it in fact lacks majority support, such an employer may well wish to convey its good faith to its employees, and thereby reduce the risk of litigation or a labor strike, by taking a poll to confirm the union's status before withdrawing recognition. The Board has acted reasonably both in giving employers that option and in limiting that option to the circumstances in which polls are in fact likely to reveal a loss of majority support. In any event, even if it were irrational for the Board to apply the same standard

for polls and withdrawals of recognition, the proper judicial response would be to permit the Board, on remand, to consider alternative regulatory approaches in the first instance, not, as several courts have assumed, to invent a new polling standard and impose it on the Board.

ARGUMENT

I. THE BOARD'S "REASONABLE DOUBT" STANDARD FOR DETERMINING THE LAWFULNESS OF EMPLOYER-SPONSORED POLLS IS A PERMISSIBLE EXERCISE OF THE BOARD'S AUTHORITY TO IMPLEMENT SECTIONS 8(a)(1) AND 8(a)(5) OF THE NATIONAL LABOR RELATIONS ACT

The task of "effectuat[ing] national labor policy" by "striking th[e] balance" among competing interests in the workplace is "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957); accord *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978). The Board is therefore entitled to "considerable deference" in formulating rules "to fill the interstices of the [Act's] broad statutory provisions," so long as those rules are "rational and consistent with the Act." *Curtin Matheson*, 494 U.S. at 786-787; accord *Auciello Iron Works, Inc.* v. *NLRB*, 116 S. Ct. 1754, 1759 (1996) (Board is due "considerable deference" to "develop national labor policy through interstitial rulemaking") (internal citation omitted); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987) (similar).

The principal issue in this case is whether the Board has acted "rational[ly] and consistent[ly] with the Act" in authorizing an employer to poll its employees concerning their support for an incumbent union only if that employer has a "good-faith reasonable doubt," based on objective evidence, concerning the union's continued majority status. That issue turns on two distinct inquiries, which we address in points I(A) and I(B) respectively. First, is the Board's standard for employer-sponsored polling, taken by itself, a reasonable means of "striking th[e] balance" among competing interests "to effectuate national labor policy"? *Truck Drivers*, 353 U.S. at 96. Second, is it rational for the Board to apply the same standard for polling as it applies in judging the lawfulness of an employer's unilateral withdrawal of recognition from a union? Although, in our view, both of those questions should be answered in the affirmative, it is nonetheless important to keep them distinct. Even if the second question were properly answered in the negative, as several courts of appeals have held, the appropriate remedy would be a remand to the Board for reexamination of its regulatory scheme, not (as those courts believed) invalidation of the Board's current polling standard or the imposition of an alternative scheme developed in the first instance by the federal judiciary.

A. The Board's Standard For Employer-Sponsored Polls Is A Permissible Means Of Advancing The Act's "Overriding Goal" Of Industrial Peace

1. As this Court has held, the "overriding policy" of the National Labor Relations Act is "industrial peace," and the Board's principal duty is to advance that policy by "promot[ing] stability in collective-

bargaining relationships, without impairing the free choice of employees." *Fall River*, 482 U.S. at 38; accord *Auciello Iron Works*, 116 S. Ct. at 1758 ("The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees."). That is the purpose and the effect of the Board's decision to limit the use of polling in the workplace. "[P]olling employees about their continued support for an incumbent union is itself potentially, if not inherently, both disruptive of the collective bargaining relationship between an employer and a union and also unsettling to the employees involved," for the very act of "[s]ubmitting a union's role as representative to an employer-initiated and conducted employee referendum raises simultaneously a challenge to the union in its role as representative and a doubt in the mind of an employee as to the union's status as his bargaining representative." *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1061-1062 (1989), remanded as modified, 923 F.2d 398 (5th Cir. 1991). Moreover, polling permits "a recalcitrant employer" to "keep[] the bargaining relationship in a recurrent state of turbulence by periodically compelling the union to reestablish its majority." *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 723-724 (1974).[2]

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[2] This case involves a successorship, a situation in which "[t]he rationale behind the presumptions [favoring a union's continued majority support] is particularly pertinent." *Fall River*, 482 U.S. at 39. As this Court has explained, "[d]uring a transition between employers, a union is in a peculiarly vulnerable position," for "[i]t has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the

Although, in limited circumstances, the Board has long permitted employers to conduct such polls, nothing in the text of the Act requires it to do so or addresses the issue of employer-sponsored polling. Indeed, precisely because such polling often imperils the Act's "overriding policy" of "industrial peace," *Fall River*, 482 U.S. at 38, some commentators have advocated the complete elimination of polling as a method for determining whether a union has retained majority support. See, *e.g.*, Flynn, *A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union*, 1991 Wis. L. Rev. 653, 674-677, 705; see also pp. 41-42, *infra*. That course would preserve a variety of mechanisms for challenging a union's majority status: an employer would retain the option of petitioning the Board to conduct an RM election, and, as discussed below, the employees themselves—whose interests are most directly at stake—may obtain a Board-sponsored decertification election by

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new employer must bargain with it." *Ibid.* Accordingly, "during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor." *Ibid.* Therefore, "[w]here * * * the union has a rebuttable presumption of majority status, this status continues despite the change in employers," and "the new employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor." *Id.* at 41; see also *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 278-279 (1972). Here, it is undisputed that petitioner, as a successor to Mack, hired its entire workforce from Mack's staff, and therefore was obligated to bargain with the Union absent a valid basis for rebutting the Union's presumption of majority status. Pet. App. 2, 20, 32 n.4, 42; see also Pet. Br. 9.

filing a petition supported by at least 30% of the unit employees. See 29 U.S.C. 159(c)(1)(A)(ii); 29 C.F.R. 101.18(a).

To date, however, the Board has adhered to its longstanding decision to "acknowledge an employer's right to conduct" such polls despite the inherent threat that they pose to industrial peace. *Texas Petrochemicals*, 296 N.L.R.B. at 1061. So long as the Board recognizes that right, however, it is entirely reasonable, and fully consistent with the purposes of the Act, for the Board to limit the use of those polls to circumstances in which their threat to workplace stability is outweighed by a strong probability that a poll will reveal that a union in fact lacks majority status: *i.e.*, circumstances in which, before taking the poll, the employer has a good-faith reasonable doubt, based on objective evidence, concerning whether a majority of employees continues to support the union.

Petitioner offers no valid basis for challenging the Board's refusal to extend an employer's authority to poll to circumstances in which the employer's evidence about union support falls short of that standard. Although petitioner suggests that a broader polling authority is necessary to ensure that employers meet their statutory duty to bargain only with unions that have majority support, Pet. Br. 27-28; see also Chamber of Commerce Amicus Br. 12 n.2, that concern is baseless. As the Board has observed, the presumption of continuing majority status, unless and until rebutted, "effectively insulates an employer against an allegation that it is unlawfully recognizing a minority incumbent union." *Texas Petrochemicals*, 296 N.L.R.B. at 1062.

Instead, in asserting principles of "employee choice" (Pet. Br. 27), petitioner seeks, at bottom, to

act "as its workers' champion" against their union. *Auciello Iron Works*, 116 S. Ct. at 1760. As this Court recently observed, however, "[t]here is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." *Ibid.* Indeed, "[t]o allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to industrial peace, it is inimical to it." *Ibid.* (internal brackets omitted) (quoting *Brooks* v. *NLRB*, 348 U.S 96, 103 (1954)); see also *NLRB* v. *Financial Institution Employees*, 475 U.S. 192, 209 (1986). That employees know how to exercise their own decertification rights under the Act is shown by the fact that, in fiscal year 1995, 971 employee-sponsored decertification petitions were filed with the Board. See *Sixtieth Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 1995*, at 11, 121 (1996) (*60th Annual Report*).[3]

2. In addition to petitioner's argument that it is irrational for the Board to apply the same "reasonable

[3] There is no merit to petitioner's assertion (Br. 29-30 & n.21) that a decertification petition "can easily be blocked by the filing of even meritless unfair labor practice charges." See also *id.* at 15 n.14. Under the Board's "blocking charge" rule, the filing of certain types of unfair-labor-practice charges, such as a charge alleging an unlawful withdrawal of recognition, will ordinarily halt the processing of an election petition, but only if, after an investigation, the Board determines that the charge has merit. *NLRB Casehandling Manual (Part Two), Representation Proceedings* § 11730.3 (Sept. 1989); see *NLRB* v. *Big Three Indus., Inc.*, 497 F.2d 43, 51-52 (5th Cir. 1974). If a charge is meritless, the Board makes that determination promptly and dismisses it. See *60th Annual Report* 9 (median time from filing of charge to issuance of complaint was 60 days during fiscal year 1995).

doubt" standard to employer-sponsored polling that it applies to withdrawals of recognition—a claim that we address in point I(B) below—petitioner challenges the substance of that standard itself on two principal grounds. First, petitioner claims that any standard conditioning an employer's authority to poll its employees on a reasonable doubt about the union's majority status is "contrary to the Act"; petitioner suggests that Section 8(a)(1), 29 U.S.C. 158(a)(1), which makes it an unfair labor practice "to interfere with, restrain, or coerce employees" in the exercise of their collective-bargaining rights, provides no statutory basis for regulating employer-sponsored polls. Second, petitioner contends that the polling standard that the Board applies is in fact stricter than the standard that it professes: that, in practice, the Board "require[s] proof, via a head count," that a majority of employees do not support the union (Pet. Br. 33); and that this covert standard is inherently irrational because it requires an employer to "obtain[] so much evidence of no majority support as to render the poll superfluous" (*id.* at i). We address each of those contentions in turn.

a. Petitioner argues (Br. 22-24) that the Board's polling standard "is contrary to the Act" because, in petitioner's view, a poll conducted in conformity with the Board's procedural guidelines (as petitioner claims was the case here)[4] cannot impair collective-

[4] Under *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967), and its progeny, the Board requires an employer to communicate the purpose of its poll to its employees, to assure those employees against reprisals, and to conduct the poll by secret ballot; and the Board also conditions an employer's authority to take a poll on a showing that the employer has not engaged in unfair labor practices or otherwise created a coer-

bargaining rights in violation of Section 8(a)(1), which, petitioner correctly notes, was the sole statutory basis upon which the Board found the poll in this case to be unlawful. See also Chamber of Commerce Amicus Br. 20-22. For two separate reasons, that claim is not properly before this Court; and, in any event, it is without merit.

First, although petitioner has raised a number of challenges to the rationality of the Board's polling standard, neither in the court of appeals nor in its petition for certiorari did petitioner claim that the Board had acted beyond the scope of its statutory authority in setting substantive limits on the circumstances in which an employer may conduct polls of its employees. Indeed, that claim appears inconsistent with the central theme of the petition: that the Act requires the Board to adopt the lower polling standard (see pp. 7-8, *supra*) created by the Fifth, Sixth, and Ninth Circuits. See Pet. 10-11; Reply Br. 2-5.[5] In contrast, petitioner's new claim would appear

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cive atmosphere. Subsequently, in *Texas Petrochemicals*, the Board held that employers seeking to poll their employees concerning their continued support for an incumbent union must also give the union "reasonable advance notice of the time and place of the poll." 296 N.L.R.B. at 1061. Petitioner is incorrect in asserting that the Board found that its poll "complied with the *Struksnes* and *Texas Petrochemicals* procedural guidelines." Br. 23. Rather, having concluded that petitioner did not meet the "reasonable doubt" polling standard, the Board declined to decide whether the poll was conducted in conformity with the Board's procedural guidelines; in particular, the Board found it "unnecessary to decide whether * * * [petitioner] provided the Union sufficient advance notice of the poll." Pet. App. 26 n.9.

[5] Petitioner argued in the court of appeals that the Board is required to adopt that lower standard and that its poll satisfied that standard. See Pet. C.A. Opening Br. 17 ("The Court of Appeals standard, rather than the NLRB standard, is correct."); Pet. C.A. Reply Br. 7 ("The NLRB made no real effort to consider the evidence under the courts' standard. Properly considered, there was a reasonable basis for doubting the Union's support.").

to foreclose subjecting employer-sponsored polling to any substantive standards at all. Because that claim was neither made to nor passed on by the court of appeals, and because it was not presented in the petition, this Court should decline to consider it. See, *e.g.*, *Holly Farms Corp.* v. *NLRB*, 116 S. Ct. 1396, 1402 n.7 (1996); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); see also Sup. Ct. R. 24.1(a).

Second, even if petitioner had properly preserved this new claim, this case would be an inappropriate vehicle for resolving it, as we would have noted in opposing the petition for certiorari if the claim had appeared there. In past cases, the Board has based its "reasonable doubt" polling requirement not just on its authority to implement Section 8(a)(1) of the Act, but also—and often principally—on its independent authority under Section 8(a)(5), 29 U.S.C. 158(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." See pp. 5-7, *supra*; *e.g.*, *Texas Petrochemicals*, 296 N.L.R.B. at 1058. Neither petitioner nor its amici (see, *e.g.*, Chamber of Commerce Amicus Br. 20-22) claim that the Board's polling standard is beyond the scope of its authority to implement Section 8(a)(5). Instead, petitioner observes (Br. 22) that, in this particular case, the Board found only that petitioner's poll violated Section 8(a)(1), rather than both Section 8(a)(1) and (5). That

peculiarity of the Board's holding, however, is the result of a failure by the Board's General Counsel to allege a violation of Section 8(a)(5) in the complaint. See Pet. App. 26 n.9. Thus, even if petitioner's Section 8(a)(1) claim had merit, which it does not, that claim would not affect the Board's separate authority under Section 8(a)(5) to proscribe conduct by an employer that independently constitutes a "refus[al] to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5).

In any event, Section 8(a)(1) does in fact authorize the Board to adopt rules limiting the circumstances in which an employer may poll its employees about their continued support for a union. As noted, that provision makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their collective-bargaining rights under the Act. 29 U.S.C. 158(a)(1). To permit every employer, once a union's majority status becomes rebuttable, to poll its employees whenever it chooses, and without any independent evidence of employee dissatisfaction with the union, would in fact seriously "interfere with" and "restrain" the collective-bargaining rights that Section 7 of the Act, 29 U.S.C. 157, guarantees to employees.[6]

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[6] Amicus Chamber of Commerce also suggests that the Board has acted "*ultra vires*" in imposing substantive limits on employer-sponsored polling. See Br. 20-22. To the extent, however, that the Chamber recognizes the Board's authority to impose such limits in individual cases but nonetheless contends that the Board is powerless to rely on its experience in labor-management relations to generalize about the kinds of employer practices that impair employees' collective-bargaining rights (see *ibid.*), that argument is without merit. See generally *Auciello Iron Works*, 116 S. Ct. at 1759 (Board acted reasonably in relying on its expertise to formulate "bright-line rule" governing unfair labor practices and foreclosing need for "case-by-case determinations"). To the extent that the Chamber makes the separate point that the Board has forbidden "*any* poll conducted before an employer knows the outcome" (Br. 20), that contention is simply incorrect, as discussed below (see pp. 29-35).

Employer-sponsored polling threatens to throw "the bargaining relationship in[to] a recurrent state of turbulence by periodically compelling the union to reestablish its majority," *Montgomery Ward*, 210 N.L.R.B. at 723-724; moreover, polling suggests to employees that the employer is anxious to withdraw recognition from the union and deal with them directly and individually, rather than collectively. See *Texas Petrochemicals*, 296 N.L.R.B. at 1061-1062. Thus, the broad polling rights proposed by petitioner would require the union to "divert[] its attention and resources from representing the workers to defending itself," *Peoples Gas Sys., Inc.* v. *NLRB*, 629 F.2d 35, 44 (D.C. Cir. 1980), and the union might thus be "tempted to make unreasonable demands in order to retain the allegiance of the employees," *Hutchison-Hayes Int'l, Inc.*, 264 N.L.R.B. 1300, 1305 (1982) (quoting *United States Gypsum Co.*, 157 N.L.R.B. 652, 655 (1966)). Because a union cannot effectively represent employees under such unstable circumstances, petitioner's approach would frustrate the statutory right of employees to engage in collective bargaining. For those reasons, among others, even the courts that have deemed the Board's "reasonable doubt" standard too strict have tacitly acknowledged the Board's statutory authority to protect employees' collective-bargaining interests by limiting the circumstances in which employers may conduct such

polls, including polls that satisfy the Board's procedural standards. See *NLRB* v. *A.W. Thompson, Inc.*, 651 F.2d 1141, 1145 (5th Cir. 1981); *Thomas Indus., Inc.* v. *NLRB*, 687 F.2d 863, 869 (6th Cir. 1982); *Mingtree Restaurant, Inc.* v. *NLRB*, 736 F.2d 1295, 1299 (9th Cir. 1984).

Finally, citing the Board's greater willingness to permit employer-sponsored polling where a union is engaged in an initial organizing campaign, see generally *Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967), petitioner also contends (Br. 23) that the Board's limitation on the circumstances in which an employer may poll employees about their support for an *incumbent* union unlawfully distinguishes between "polls in which unions stand to gain and polls in which they stand to lose." That argument is without merit, however, because it seeks to "make situations that are different appear the same." *Brooks* v. *NLRB*, 348 U.S. 96, 104 (1954). In an initial organizing situation, it is unclear whether a majority of the employees have selected the union as their representative, and a poll, with procedural safeguards, is a reasonable means of ensuring that the employer will not violate Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), by voluntarily recognizing a union which has never been selected by a majority of the employees. See *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961). In an incumbent union situation, by contrast, the union *has* been selected by the employees as their exclusive bargaining representative under Section 9(a), 29 U.S.C. 159(a), and, because of the statutory policy of encouraging stability in established bargaining relationships, the union enjoys a

presumption of continuing majority status. See pp. 2-4, *supra*.[7]

b. Petitioner's remaining challenge to the inherent reasonableness of the Board's polling standard is its argument (Br. 10) that, "[a]lthough the Board continues to cite the words of the good faith doubt" standard, "it has in practice eliminated [that standard] in favor of a strict head count" confirming an actual loss of majority support. See also *id.* at 32-33; Chamber of Commerce Amicus Br. 10, 11, 20; Labor Policy Ass'n Amicus Br. 7. That assertion, which leads petitioner to conclude that the Board permits polling only where an employer "has obtained so much evidence of no majority support as to render the poll superfluous" (Br. i), is incorrect; in any event, even if the assertion had merit, it would not support the remedy that petitioner seeks here.

This Court recently recognized that, as between the two alternative methods for rebutting the presumption favoring an incumbent union's continuing majority status (see p. 4, *supra*), "the substantiation required to make [a] showing" that a union "in fact lack[s] majority support" is, as the Board has long intended, "greater than that required to assert a good-faith doubt" sufficient to justify either a poll or a withdrawal of recognition. *Auciello Iron Works*, 116 S. Ct. at 1757 n.2. For that proposition the Court cited *Curtin Matheson*, in which it had rejected the

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[7] Contrary to the contention of amicus Chamber of Commerce (see Br. 23), the Board's limitation on polling does not raise "serious * * * questions" under either the First Amendment or Section 8(c) of the Act, 29 U.S.C. 158(c). Neither of those provisions entitles an employer to engage in labor practices that violate Section 8(a)(1) or (5). See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969).

contention that the Board has "*sub silentio* * * * forsaken the good-faith doubt standard" in the replacement-worker context by requiring "some objective evidence indicating the replacements' opposition to the union." 494 U.S. at 788 n.8. The Court further observed in *Curtin Matheson* that, "[t]o show a good-faith doubt, an employer *may rely on circumstantial evidence*," whereas "to show an actual lack of majority support, * * * the employer must make a numerical showing that a majority of employees in fact oppose the union." *Ibid.* (emphasis added) (citing *Stormor, Inc.*, 268 N.L.R.B. 860, 866-867 (1984)); accord *Auciello Iron Works, Inc.*, 317 N.L.R.B. 364, 365 n.14, 368, enforced, 60 F.3d 24 (1st Cir. 1995), aff'd, 116 S. Ct. 1754 (1996).

The Board itself recently reaffirmed that it "has never imposed a requirement that there be proof of express anti-union statements by each individual worker comprising a majority of the bargaining unit in order for an employer to establish good faith doubt." *Liquid Carriers Corp.*, 319 N.L.R.B. 317, 319 n.10 (1995) (internal quotation marks and citation omitted), enforced, 101 F.3d 691 (3d Cir. 1996) (Table). As the Board explained, "[t]he most persuasive evidence, of course, would consist of expressed, unsolicited indications from the majority of unit employees that they do not wish the union to represent them," but "[m]ost cases * * * are not so straightforward." *Id.* at 319. Accordingly, "[i]n the absence of direct indications of union nonsupport from a majority of employees, the employer may rely on statements or actions of nonsupport from less than a majority of employees, combined with circumstantial evidence which may indicate a loss of majority support for the union." *Ibid.*

As the Board's opinion in *Liquid Carriers* makes clear, a "head count"—"direct indications of union nonsupport from a majority of employees"—is simply unnecessary, for purposes of either polling or withdrawal of recognition, to substantiate an employer's reasonable basis for believing that a majority of the employees no longer wishes to be represented by the incumbent union. A broad variety of prior Board decisions—holding, often in light of probative circumstantial evidence, that an employer had successfully made the necessary showing—supports that same conclusion.[8] Similarly, the Board has relied upon the

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[8] See, *e.g.*, *J&J Drainage Prods. Co.*, 269 N.L.R.B. 1163, 1163 n.1, 1171 (1984) (withdrawal of recognition lawful where only 6 of 32 employees were members of union, and union steward told employer that the employees were not interested in the union); *Stormor, Inc.*, 268 N.L.R.B. 860, 867 (1984) (withdrawal of recognition lawful where 20% of non-striking employees told employer that they and other groups of non-strikers did not want union representation, and non-strikers crossed picket line over a period of several months despite sustained strike violence); *U-Save Food Warehouse*, 271 N.L.R.B. 710, 716-718 (1984) (withdrawal of recognition lawful based on employee statements, a foreman's report based on conversations with employees, and an employee's refusal to sign an authorization card); *Sofco, Inc.*, 268 N.L.R.B. 159, 160 (1983) (withdrawal of recognition lawful based on plant manager's testimony that every employee except union steward opposed union, which included conversations with a number of specific individuals, and was corroborated by a proliferation of anti-union signs in the plant and by employees' hostility toward union steward); *I T Servs.*, 263 N.L.R.B. 1183, 1183 n.1, 1188 (1982) (withdrawal of recognition lawful where striker replacements, who constituted a majority of the unit, knew that union was seeking their discharge; a supervisor had spoken to almost all of the replacements, who told him they did not want union representation; and picketers had directed "massive" violence

existence of a good-faith reasonable doubt as to a union's majority status as a complete defense to an unlawful withdrawal-of-recognition charge, even if the union in fact actually enjoyed majority support when the employer withdrew recognition. See *AMBAC Int'l, Ltd.*, 299 N.L.R.B. 505, 506 (1990); *Arkay Packaging Corp.*, 227 N.L.R.B. 397, 398 (1976), petition for review denied, 575 F.2d 1045 (2d Cir. 1978).

In arguing that the Board has "silently abandoned" the good-faith reasonable doubt standard, and instead

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toward replacements); *Independent Ass'n of Steel Fabricators, Inc.*, 252 N.L.R.B. 922, 923, 932-933 (1980) (order regarding S. Cervenka and Sons, Inc.) (withdrawal of recognition lawful where, although employees went on strike, none picketed employer, and three of four asked employer to sign contract with another union), enforced *sub nom. NLRB* v. *Koenig Iron Works, Inc.*, 681 F.2d 130 (2d Cir. 1982); *Upper Mississippi Towing Corp.*, 246 N.L.R.B. 262, 262-264 (1979) (withdrawal of recognition lawful where union representative admitted to employer's attorney that union would be unable to win an election); *Naylor, Type & Mats*, 233 N.L.R.B. 105, 107-108 (1977) (withdrawal of recognition lawful where employees made statements to management about their own union sympathies, union failed to bargain for one of job classifications in unit, and employees (not employer) took "head counts" of coworkers and reported results to management); *Arkay Packaging Corp.*, 227 N.L.R.B. 397, 397-398 (1976) (withdrawal of recognition lawful where striking unions requested negotiations for new agreements, without any expression or claim of support among the strikers, after period of months during which time unions had made no effort to police their contracts), petition for review denied, 575 F.2d 1045 (2d Cir. 1978); *White Castle Sys., Inc.*, 224 N.L.R.B. 1089, 1092 (1976) (poll lawful where union had processed only one grievance in ten years, there were no union stewards, union representatives made statements during bargaining from which it could be inferred that the union lacked majority support, and majority of employees had expressed dissatisfaction with union).

requires "proof, via a head count," that the union has actually lost majority status (Pet. Br. 32-33), petitioner relies (see *id.* at 10 & n.8, 11) upon the Board decisions cited by the Chief Justice in his separate opinion in *Curtin Matheson*. There, the Chief Justice observed that "some recent decisions suggest that [the Board] now requires an employer to show that individual employees have 'expressed desires' to repudiate the incumbent union in order to establish a reasonable doubt of the union's majority status." 494 U.S. at 797 (Rehnquist, C.J., concurring); see also *id.* at 799-800 & n.3 (Blackmun, J., dissenting). In each of the decisions in question, however, the Board focused on expressions of anti-union sentiment attributable to specific employees only because, in those particular cases, that was the primary nature of the evidence offered by the employers to support their claims of good-faith reasonable doubt. To the extent that those employers also relied on circumstantial evidence, the Board held not that such evidence is irrelevant, but that the specific circumstantial evidence offered in those cases was insufficient to support a good-faith reasonable doubt concerning the union's majority status.[9] In sum, the Board decisions upon which peti-

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[9] Thus, in *Johns-Manville Sales Corp.*, 289 N.L.R.B. 358 (1988), enforcement denied, 906 F.2d 1428 (10th Cir. 1990), the employer introduced, among other things, a decertification petition signed by a substantial number (but less than a majority) of the employees, and comments repudiating the union by a few identified employees. *Id.* at 361. The Board accepted that evidence as relevant to, but not dispositive of, a good-faith reasonable doubt about the union's continued majority status. *Ibid.* The Board also considered circumstantial evidence proffered by the employer, but found that it was insufficient to buttress the employer's good-faith doubt claim; for example, the

tioner relies are fully consistent with the Board's recent reaffirmation of its long-standing policy not to require "proof of express anti-union statements by each individual worker comprising a majority of the bargaining unit in order for an employer to establish good faith doubt." *Liquid Carriers*, 319 N.L.R.B. at 319 n.10 (citation and internal quotation marks omitted).

In any event, even if petitioner were correct in claiming that, in particular decisions, the Board has departed "*sub silentio*" from its own polling standard, the appropriate remedy for any such departure would

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Board declined to "speculate" about the union sentiments of certain employees, who had attended mandatory company meetings at which employees had asked the employer how to "get rid of" the union, "solely on the basis of their attendance at the meetings." *Id.* at 362. In *Tube Craft, Inc.*, 289 N.L.R.B. 862 (1988), the employer introduced direct evidence about the anti-union sentiments of particular striker replacements, but the Board found that that evidence was insufficient to support a good-faith reasonable doubt as to the union's continued majority status. *Id.* at 870-872. In *Tile, Terrazo & Marble Contractors Ass'n*, 287 N.L.R.B. 769 (1987), enforced *sub nom. U.S. Mosaic Tile Co.* v. *NLRB*, 935 F.2d 1249 (11th Cir. 1991), cert. denied, 502 U.S. 1031 (1992), the employer relied on anti-union petitions signed by substantially less than one-third of the employees in the bargaining unit. *Id.* at 783-784. Petitioner also relies (Br. 10 n.8) on two cases not cited by the Chief Justice in his concurring opinion in *Curtin Matheson*; in those cases, too, the employer proffered primarily evidence about the union sentiments of particular employees. See *Alcon Fabricators*, 317 N.L.R.B. 1088, 1090-1091 (1995) (employee remarks to management), vacated and remanded, No. 96-5231, 1997 WL 234618 (6th Cir. May 6, 1997); *Phoenix Pipe & Tube*, 302 N.L.R.B. 122, 122-123 (employee remarks to management and an employee petition requesting "the right to vote for or against a union shop"), enforced, 955 F.2d 852 (3d Cir. 1991).

not be invalidation of the standard itself, but a remand to the Board for a reasoned reapplication of that standard in any individual case in which the standard has been misapplied. See, *e.g.*, *Bio-Tech Corp.* v. *NLRB*, 105 F.3d 890, 896-897 (3d Cir. 1997); *Stardyne, Inc.* v. *NLRB*, 41 F.3d 141, 153-154 (3d Cir. 1994); see also *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978). As discussed in point II below, this is not such a case. To the extent that petitioner invokes the related but distinct concern that practical considerations can sometimes make it difficult for employers to *have* a good-faith reasonable doubt about a union's majority status without taking a poll, cf. *Curtin Matheson*, 494 U.S. at 799-800 & n.3 (Blackmun, J., dissenting), that is a permissible consequence of the Board's policy decision to promote industrial stability by relying principally on employees (rather than on their employers) to determine whether and how they wish to engage in collective bargaining. As this Court recently reaffirmed, the Board is "entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one." *Auciello Iron Works*, 116 S. Ct. at 1760; see pp. 20-22, *supra*.

B. The Board's Polling Standard Is Consistent With Other Aspects Of Its Regulatory Scheme

As discussed above, petitioner's challenges to the substantive validity of the "reasonable doubt" standard are without merit: that standard is consistent with the Act and is a reasonable means of advancing the Act's "overriding policy" of "industrial peace."

See *Fall River*, 482 U.S. at 38. Petitioner separately challenges, however, the consistency of that standard with other aspects of the Board's regulatory scheme. In particular, petitioner contends (see, *e.g.*, Br. 25) that it is irrational for the Board to require the same showing—a good-faith reasonable doubt about a union's continued majority status—to justify an employer-sponsored poll as to justify an employer's unilateral withdrawal of recognition from a union. That contention is incorrect; and, even if it were correct, the proper remedy would not be invalidation of the polling standard itself, as petitioner suggests, but a remand to the Board for reexamination of its regulatory scheme as a whole.

1. Because, as we have discussed, an employer can establish a good-faith reasonable doubt as to a union's majority status without proof that the union has in fact lost the support of a majority of the bargaining-unit employees, an employer-sponsored poll can serve a valuable purpose even if the standards for polling and unilateral withdrawal of recognition are the same. As the Board has explained, while an employer with "a reasonable doubt about the union's continued majority * * * could, on the strength of that doubt, withdraw recognition, there still remains an inherent uncertainty about whether the union has *actually* lost its majority support." *Texas Petrochemicals*, 296 N.L.R.B. at 1063. Thus, rather than "simply withdraw recognition from a union that might still in fact have majority support, an employer may wish first to poll its employees to obtain more certain, precise information about the union's support than is provided by its own reasonable doubt." *Ibid.*

Petitioner contends (Br. 31) that, so long as the standards for polling and withdrawal of recognition

are the same, an employer nonetheless "has nothing to gain from taking [a] poll" because the poll results can justify a subsequent withdrawal of recognition only if the poll was itself valid, see *Texas Petrochemicals*, 296 N.L.R.B. at 1064; thus, petitioner suggests, an employer can never ease its ultimate evidentiary burden for justifying a withdrawal of recognition by first taking a poll. To be sure, that the standards for polling and withdrawal of recognition are identical does mean that polling has little utility for an employer that *lacks* a "good-faith reasonable doubt" about a union's continued majority status but is nonetheless determined to withdraw recognition from the union in any event. "The same need for repose" (*Auciello Iron Works*, 116 S. Ct. at 1758) that led the Board to limit polling to cases in which an employer actually has a reasonable doubt concerning majority status has also led the Board, in a determination that petitioner does not directly challenge, to enforce that policy by barring an employer *without* such a doubt from conducting a poll anyway and then using the result as a post-hoc justification for having done so. See *Texas Petrochemicals*, 296 N.L.R.B. at 1064; see also Pet. App. 27 & n.11.

By contrast, an employer that *does* have "a reasonable doubt about a union's continued majority," but that nonetheless faces "uncertainty about whether the union has *actually* lost its majority support," *Texas Petrochemicals*, 296 N.L.R.B. at 1063, might well wish to conduct a poll to resolve that uncertainty before unilaterally withdrawing recognition from a union. That is so even though, in those circumstances, the same "reasonable doubt" standard would shield the employer from liability for withdrawing recognition if it is later determined that a majority of

employees actually did support the union. See, *e.g.*, *AMBAC Int'l*, 299 N.L.R.B. at 506; *Arkay Packaging*, 227 N.L.R.B. at 398.[10] Many employers acting in good faith—and wishing to convey that good faith to their employees—would not wish to withdraw recognition from a union unless they could first confirm whether or not that union in fact lacks majority support; polling is one method of making that determination. For that reason, even though the standards governing the legality of the two courses of action are the same, there are often "sound business reasons" for taking a poll before withdrawing recognition: "The employer may wish to resolve the representational issue more quickly, or reduce the risk of a [post-withdrawal-of-recognition] strike, or minimize damage to the collective-bargaining relationship and demonstrate good faith to its employees." *Texas Petrochemicals*, 296 N.L.R.B. at 1063.

It is true that the Board's "reasonable doubt" standard is sufficiently rigorous and fact-specific that employers often cannot be certain in advance whether their evidentiary basis either for taking a poll or for withdrawing recognition will ultimately be deemed to have met that standard. But some degree of indeterminacy in this context is inevitable, and petitioner cites no basis for believing that the "loss of support" standard favored by some courts would be any more determinate, or any less likely to lead to litigation, than the Board's standard. In any event, the fact-

[10] Similarly, if the union loses the poll and the employer withdraws recognition based on the poll results, the employer can defeat an unfair-labor-practice claim simply by showing that, before the poll, it had a good-faith reasonable doubt regarding the union's majority (and not necessarily proof of an actual loss of majority support).

specific character of the Board's polling standard provides no basis for requiring that standard to be different from the standard for withdrawals of recognition.[11]

2. Even if it were "irrational" for the Board to apply the same standard for polling as for withdrawals of recognition, which it is not, the proper judicial remedy would be to remand this case to the Board for reconsideration of its regulatory scheme in the first instance, not to bar the use of that standard in the polling context or to invent an entirely new standard and impose it on the Board. See *South Prairie Constr. Co.* v. *Local No. 627, Int'l Union of Operating Engineers*, 425 U.S. 800, 805-806 (1976) (per curiam); *NLRB* v. *Food Store Employees Union, Local 347*, 417 U.S. 1, 9-10 (1974). Thus, in prescribing a specific policy solution for the "anomaly" that they perceived in the Board's regulatory scheme, the courts of appeals that have adopted a "loss of support" standard to replace the Board's own standard (see pp. 7-8, *supra*) "did not give 'due observance [to] the distribution of authority made by Congress as between

[11] Indeed, that fact-specific character underscores the continued utility of polling even though those standards are the same. For example, if a poll reveals a wholesale lack of support for a union and the employer thereafter withdraws recognition, the union would be less inclined to challenge the employer's evidentiary basis for conducting the poll than it would have been to challenge the employer's evidentiary basis for withdrawal of recognition in the absence of a poll, and the union would also be less likely to call a post-withdrawal strike. See *Texas Petrochemicals*, 296 N.L.R.B. at 1063. Similarly, where a poll reveals continued majority support for a union, the employer will know not to withdraw recognition, and the prevailing union will be quite unlikely to challenge the poll as an unfair labor practice.

its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution.'" *South Prairie Constr.*, 425 U.S. at 806 (quoting *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940)).

The need to respect that "distribution of authority" is particularly acute in this case because, if this Court were to require different standards for polling and withdrawal of recognition, the Board would then need to choose among a variety of alternative approaches for promoting the policy objectives of the Act. Specifically, invalidation of the Board's existing approach would not require adoption of a lower polling standard like the one invented and imposed by the Fifth, Sixth, and Ninth Circuits.[12] As the court of appeals in this case observed (see Pet. App. 8), the Board could also reasonably choose, for example, to "impose a more stringent evidentiary standard on employers who withdraw recognition without having the results of a poll or an RM election" or to "set a higher standard for withdrawals of recognition and a lower standard for RM elections."

Indeed, the Board's General Counsel has argued that the Board should relax the standards for both polling and RM elections but abrogate the policy permitting employers to withdraw recognition from a union upon a showing of a "good-faith doubt" concerning the union's majority status. See General Counsel's Exceptions and Brief at 8-13, *Chelsea Indus., Inc.*, No. 7-CA-36846 *et al*; cf. *Curtin Matheson*, 494 U.S. at 788 n.8.[13] Another commentator has argued that the

[12] Indeed, as the Board has explained, the approach adopted by those courts would itself create a true anomaly: it would "require an employer to show sufficient objective considerations on which to base a reasonable doubt about an incumbent union's majority support in order to have a formal, Board conducted RM election," but permit "that same employer to conduct an in-house, relatively informal poll for the same purpose, with the same serious potential consequences for the union and the employees, on the basis of a significantly less stringent evidentiary predicate, i.e. the courts' 'loss of support' standard." *Texas Petrochemicals*, 296 N.L.R.B. at 1060. Petitioner counters (Br. 25) that the same standard that applies to Board elections should not apply to employer-sponsored polls, because, "while a poll and a Board-conducted election are similar in purpose, *they are not similar in consequences*." While it is true, as petitioner observes (*ibid.*), that an election, but not a poll, generally precludes the holding of another election in the same bargaining unit for one year (see 29 U.S.C. 159(c)(3)), an election and a poll nonetheless share "the same serious potential consequences for the union and the employees" because "[t]he purpose of RM elections and employer polls is to determine whether an incumbent union still has majority support," and "their potential consequence * * * is loss of recognition and standing as collective-bargaining representative for the union, and loss of representation for the employees." *Texas Petrochemicals*, 296 N.L.R.B. at 1060. In light of the common legal and practical consequences shared by elections and polls, it is reasonable for the Board to conclude that the standard for polling should be no lower than that for a Board election—even if other options would also be reasonable for the Board to adopt.

[13] Upon the filing of our opposition to the petition for certiorari, we lodged a copy of the General Counsel's brief with this Court and served a copy on petitioner. As of the date of this filing, the Board has not yet decided *Chelsea Industries*. The Board declined to adopt a similar proposal in *Lee Lumber & Building Material Corp.*, 322 N.L.R.B. No. 14, 153 L.R.R.M. (BNA) 1158 (1996), petition for review and cross-application for enforcement pending, No. 96-1362 (D.C. Cir., argued May 14, 1997), for reasons unrelated to the proposal's merits. See 153 L.R.R.M. (BNA) at 1161 n.14 ("As the parties and amici were not notified that this issue would be a subject for consideration by the Board, we decline to address it at this time.").

Board should lower its standard for conducting RM elections but abolish both polling and unilateral withdrawals of recognition. See Flynn, *supra*, 1991 Wis. L. Rev. at 705. Although the Board has endorsed neither of those approaches, each would remain a possible option if this Court were to invalidate the Board's present regulatory scheme as internally inconsistent.

II. THE BOARD REASONABLY CONCLUDED THAT PETITIONER LACKED SUFFICIENT EVIDENCE OF A LOSS OF MAJORITY SUPPORT, PRIOR TO CONDUCTING ITS POLL, TO SATISFY THE BOARD'S REASONABLE-DOUBT STANDARD

Applying its reasonable-doubt standard to the facts of this case, the Board found that petitioner's poll was an unfair labor practice because, when the poll was announced, petitioner lacked a reasonable basis for believing that a majority of the employees in the bargaining unit no longer wished to be represented by the Union. Pet. App. 20-21, 26 n.9. The court of appeals upheld that finding as supported by substantial evidence. *Id.* at 9-12. Petitioner offers no basis for doubting the correctness of either the Board's disposition or the court of appeals' review of that factbound inquiry—a matter that would not ordinarily warrant further review by this Court, see *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

1. The Board found that, as of January 25, 1991, the date on which petitioner informed the Union that it had decided to poll the employees, petitioner had no objective basis for believing that any more than six or

seven[14] out of the 32 employees in the bargaining unit—*i.e.*, 20% of the workforce—opposed union representation. Pet. App. 20-21, 26 n.9. The Board reasonably concluded that that showing, without more, was inadequate to support a good-faith reasonable doubt that a majority of employees opposed the Union. Petitioner does not contend otherwise. Rather, petitioner's principal argument (Br. 35-36) is that the Board should have accepted, as *further* evidence of the Union's alleged loss of support, a statement made to management by Ronald Mohr, a Union shop steward,[15] that, "with a new company, if a vote was taken, the Union would lose," and that it was "his feeling that the employees did not want a union." See Pet. App. 53; J.A. 25, 38-39. The Board reasonably discounted the significance of that statement.

First, the Board accepted (Pet. App. 23-24) the ALJ's finding (*id.* at 55) that Mohr's assertion was

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[14] These were employees Rusty Hoffman, Joe McKilvie, Tim Frank, Scott Murphy, Kermit Bloch, David Baker, and Milt Solt, each of whom had made statements repudiating the Union. Pet. App. 50-52 & n.6.

[15] The Board and the courts have long recognized that a generalized assertion, in which one employee purports to speak for others, does not normally constitute reliable evidence about those employees' support for the union. See, *e.g.*, *Bryan Memorial Hosp.* v. *NLRB*, 814 F.2d 1259, 1262 (8th Cir.), cert. denied, 484 U.S. 849 (1987); *NLRB* v. *Cornell of California, Inc.*, 577 F.2d 513, 516-517 (9th Cir. 1978); *Westbrook Bowl*, 293 N.L.R.B. 1000, 1001 & n.11 (1989); *Sofco, Inc.*, 268 N.L.R.B. 159, 160 n.10 (1983). Nonetheless, such evidence may sometimes be deemed reliable where the individual who purports to speak for his co-workers is a steward or other union official. See, *e.g.*, *J&J Drainage Prods. Co.*, 269 N.L.R.B. at 1171; *Upper Mississippi Towing Corp.*, 246 N.L.R.B. at 263-264; *Universal Life Ins. Co.*, 169 N.L.R.B. 1118, 1119 (1968).

"almost off-the-cuff [in] nature," and there was "no evidence with respect to how he gained this knowledge." Second, the Board noted (*id.* at 24) that Mohr was a steward for the service department employees, but not for the parts department employees, and thus he "had no more basis than any other employee for reporting the union sentiments of employees in the parts department." Third, the Board found (*id.* at 23-24), as had the ALJ (*id.* at 53-55), that Mohr made his remark to management before it began interviewing employees in December 1990, and that he therefore must have been referring to the Union's level of support among Mack's complement of employees, not among petitioner's smaller complement of employees.

Petitioner asserts (Br. 35-36) that it was "illogical" for the Board to discount Mohr's remark on the ground that he was referring to the union sympathies of Mack's employees, not petitioner's employees. But petitioner does not now challenge (cf. *id.* at 36 n.26) the ALJ's principal finding, upheld by the Board, that Mohr's remark was "almost off-the-cuff [in] nature" and bereft of any discernible factual basis. That finding was an adequate and independent basis for the decision to discount the remark's significance. As the court of appeals noted (Pet. App. 12), such remarks do not bear "sufficient indicia of reliability" to permit an employer to rely upon them as probative evidence of the union sentiments of its workforce.

Petitioner suggests (Br. 36) that the Board's treatment of Mohr's remark is inconsistent with its prior decisions in *American Mirror Co.*, 277 N.L.R.B. 1626 (1986), and *Naylor, Type & Mats*, 233 N.L.R.B. 105 (1977). Those cases, however, are far afield from this one. As the court of appeals noted (Pet. App. 12), in those cases "the information the employer received

about other employees was, unlike the information the company relied on here, specific and detailed." Thus, as the Board observed in its decision here (*id.* at 24 n.8), the employer in *Naylor, Type & Mats* acted reasonably in relying on the testimony of two employees concerning the union sentiments of their co-workers because those employees had identified specific employees who supported or opposed the union. See 233 N.L.R.B. at 108. Mohr's statement bore no such indicia of reliability. Similarly, in *American Mirror*, the Board found that the employer reasonably relied on a series of reports by employees to management that the union no longer enjoyed majority support: the employer had received four separate such reports, each of which corroborated the other; at least one of the reports specified the employees who were said to oppose union representation; and the reports were consistent with signed statements received by the employer from a substantial number of employees. See 277 N.L.R.B. at 1626 & n.5. No similar evidence corroborated Mohr's remark in this case.

2. Petitioner also contends (Br. 39) that the Board attributed too little probative value to the fact that Kermit Bloch, a night-shift employee, told management that "the entire night shift," consisting of five or six employees, "did not want the Union." See Pet. App. 51; J.A. 48-49. As the ALJ explained (Pet. App. 51-52), however, because neither Bloch nor any of the other night-shift employees testified, it is unknown "how he formed his opinion about the views of his fellow employees," and "[t]here is no showing that they made independent representations about their union sympathies." In those circumstances, the Board—upheld by the court of appeals (*id.* at 11-12)—reason-

ably concluded that petitioner could rely on Bloch's statement only to the extent that it reflected his own lack of continued support for the Union. *Id.* at 52.

3. Finally, petitioner challenges (Br. 37-38) the Board's treatment of separate statements made to management by four other employees—Mike Ridgick, Dennis Wehr, Randy Zoltack, and Dennis Marsh—concerning their own individual union sentiments (not those of their co-workers). In each case, the Board's decision to discount the statement at issue was reasonable.

In 1986, Ridgick had asked Robert Dwyer, Mack's branch manager and petitioner's future president, about the process for decertifying a union. Pet. App. 47 & n.5; J.A. 33-34. The Board reasonably concluded that, because Ridgick had posed that question in 1986, it was too remote in time to bear on his union sentiments in January 1991. Pet App. 48; see *Manna Pro Partners, L.P.* v. *NLRB*, 986 F.2d 1346, 1353 (10th Cir. 1993). Indeed, there is no evidence that Ridgick took any action to decertify the Union after his 1986 inquiry. Petitioner asserts (Br. 37) that Ridgick's anti-Union sentiment in 1986 was "consistent" with his position, expressed during his job interview with petitioner in December 1990, that, "as long as the new company would treat them [*i.e.*, the employees] right, there was no need for a Union." See Pet. App. 48; J.A. 56. Even on its face, that remark was not a repudiation of the Union—unions are formed precisely because employees fear that management will not "treat them right"—and, in any event, the Board reasonably concluded that Ridgick's interview remark was non-probative because he made it only after the interviewer, representing petitioner, had told him that "the new company would be non-union." Pet. App. 21

n.4, 47; J.A. 63-64. As the court of appeals explained (Pet. App. 10), "[s]uch employee expressions are unlikely to be sincere." See *NLRB* v. *Middleboro Fire Apparatus, Inc.*, 590 F.2d 4, 9 (1st Cir. 1978).[16]

Employee Marsh stated during his job interview with petitioner that he was "not being represented for the $35 he was paying" in dues. Pet. App. 50; J.A. 57. The Board reasonably concluded (Pet. App. 51) that, because Marsh's comment was "more an expression of desire for better representation than one for no representation at all," it was not a valid basis for believing that he no longer supported the Union. See, *e.g.*, *Wagon Wheel Bowl, Inc.* v. *NLRB*, 47 F.3d 332, 335-336 (9th Cir. 1995). Similarly, employee Zoltack told management in February 1991 that "the Union was a waste of $35." Pet. App. 51; J.A. 57. Not only was that statement, like Marsh's, reasonably understood as a complaint about the quality of the Union's representation rather than a rejection of the Union, but, in addition, Zoltack made the statement after petitioner had already decided to conduct the poll on January 25, and thus "his feelings could not have been part of [petitioner's] good-faith doubt as of that date." Pet. App. 51.[17]

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[16] Petitioner misstates the record in suggesting (Br. 37) that the Board discounted Ridgick's December 1990 interview statement on the ground that "Ridgick was a manager (interviewing for a bargaining unit job), as if that automatically meant that Ridgick was insincere." Rather, the ALJ simply noted, in his overall discussion of the issue, that, "[a]s Ridgick was a member of management at the time he made the statement, I would find it hard to believe that he would express any prounion sentiment during the job interview." Pet. App. 48.

[17] There is no merit to petitioner's suggestion (Br. 37 n.28) that it was arbitrary for the Board to treat January 25, 1991, as

Finally, employee Wehr told Mack branch manager Dwyer in July 1990 that, if the latter were elected a principal of a new company, "we didn't have to have a union." Pet. App. 49; J.A. 24. The Board, upheld by the court of appeals (Pet. App. 9), reasonably concluded that petitioner could not rely on Wehr's statement because, although it had hired Wehr in December 1990, he quit on January 23, 1991, and thus was not in the bargaining unit on January 25, 1991, the date on which petitioner informed the Union that it had decided to poll the employees. *Id.* at 49-50; J.A. 35-36.

In sum, the Board acted reasonably in concluding that, at the time the poll was announced, petitioner lacked a good-faith reasonable doubt, based on objective considerations, concerning whether a majority of its employees continued to support the Union. Indeed, in our view, the Board was also correct in determining, in the alternative, that petitioner's basis for conducting that poll was insufficient even to satisfy the "loss of support" standard created by the Fifth, Sixth, and Ninth Circuits. See Pet. App. 26 n.9.

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the relevant date for determining whether petitioner had a legal basis for deciding to poll the employees. As the court of appeals observed (Pet. App. 9), January 25 was the date as of which petitioner "had already decided to take the poll." Accordingly, it was reasonable for the Board, in assessing petitioner's claim of a good-faith reasonable doubt, to disregard the alleged union sympathies of employees who were not employed by petitioner on that date.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LAWRENCE G. WALLACE
Deputy Solicitor General

LINDA SHER
Associate General Counsel

JONATHAN E. NUECHTERLEIN
Assistant to the Solicitor General

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

JUNE 1997

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No. 96-795

In The

Supreme Court of the United States

October Term, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITIONER'S REPLY BRIEF

EARLE K. SHAWE*
STEPHEN D. SHAWE
ERIC HEMMENDINGER
ELIZABETH TORPHY-DONZELLA
SHAWE & ROSENTHAL
Sun Life Building
20 S. Charles Street
Baltimore, MD 21201
(410) 752-1040

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. THE BOARD'S STANDARD IS ARBITRARY, CAPRICIOUS AND NOT JUSTIFIED BY THE PURPOSES OF THE ACT.

The Board and the AFL-CIO seem to suggest that since there is no statutory right to poll, employers should be grateful for any limited ability to poll they might be granted by the Board and should not be heard to complain. (Bd. Br. 20, AFL-CIO Amicus Br. 7.) That argument frames the issue backwards. Employers are not granted a limited set of rights by the Board. Rather, they start out with a full set of freedoms to act and communicate, limited only by such regulations as are authorized by statute, promulgated by the Board and enforced by the courts under the appropriate standard of review. The polling standard applied by the Board in this case is arbitrary, capricious, and contrary to the purposes of the Act.

A. It is arbitrary and capricious to equate polling with withdrawal of recognition.

The most obvious problem with the Board's polling standard is its irrational treatment of polling as tantamount to unilateral withdrawal of recognition. By setting the same standard for both polling and unilateral withdrawal of recognition, the Board treats them, for all practical purposes, as the same. But clearly, they are not the same.

To state only the most obvious difference, with a poll, there is always the possibility that the union might win. Moreover, the effect of the Board's standard is to virtually

ban polling (except when it is superfluous), a result the Board professes not to seek. *See Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984) (describing Board's polling standard as "tantamount to an outright prohibition of employer-sponsored polls"); *Thomas Indus. Inc. v. NLRB*, 687 F.2d 863, 867 (6th Cir. 1982) (same); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141, 1144 (5th Cir. 1981) (same). Because polling is undeniably preferable to unilateral action, the Board's use of a single standard for both is arbitrary and capricious.

B. The process of polling is not disruptive.

The concerns about polling cited by the Board fail to support its irrational conclusion that polling is tantamount to withdrawal of recognition.

The mere process of polling does not disrupt collective bargaining. (Bd. Br. 27.) Polling itself does not change the collective bargaining relationship, unless employees choose not to be represented.[1] The Board's concern that the prospect of a poll might cause the union to react badly by, for example, making excessive demands in bargaining (Bd. Br. 27), is perhaps a factor for an employer to consider, but is hardly a basis for restricting the

[1] Polling might require a temporary delay in signing a labor contract, in order to prevent the contract bar from coming into effect. That would appear to be within the contemplation of *Auciello Iron Works, Inc. v. NLRB*, 116 S. Ct. 1754, 1759 (1996): "And, of course, it [the employer] could have withdrawn its offer to allow it time to investigate while it continued to fulfill its duty to bargain in good faith with the Union." *See American Protective Services, Inc. v. NLRB*, 113 F.3d 504 (4th Cir. 1997).

employer. The argument that polling would divert the union from representing its members to defending itself is also misguided. (Bd. Br. 27.) In an incumbent union situation, employees will decide whether or not to retain the union based on its track record in representing them.

The Board's argument that polling can be used by employers to keep the bargaining relationship in "a recurrent state of turbulence" (Bd. Br. 19) exaggerates the amount of polling that is possible.[2] Contrary to the Board's impression (Bd. Br. 26), Petitioner does not contend that polling must be permitted periodically as a matter of course or when the employees' allegiance to the union is free from doubt. Nor is polling unduly suggestive or usable to "unsettle" employees (Bd. Br. 19), since, even under Petitioner's position, employers would be permitted to poll only when employee support is already unsettled.

The Board's procedural guidelines for polling[3], set forth in *Struksnes Construction Co.*, 165 N.L.R.B. 1062

[2] There is no evidence that polling has become a problem in the Fifth, Sixth and Ninth Circuits, where the Board's polling standards have been unenforceable for some time.

[3] The Board's contention that Petitioner failed to preserve its arguments regarding the statutory authority of the Board to regulate polling under Section 8(a)(1) misstates Petitioner's position. (Bd. Br. 24.) First, Petitioner has never argued that the Board is totally without authority to regulate polling. Rather, Petitioner's position is that nothing in Section 7 or Section 8(1)(1) warrants discriminating between polls in which unions stand to gain and polls in which they stand to lose. Second, Petitioner has consistently argued that the Board's polling standard is contrary to the Act. (*See* Brief of Petitioner filed in Court of Appeals at 19-20; Petition for Certiorari at 6, 8.)

(1967) and *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989) (adding requirement of advance notice), are adequate to regulate the process by which polls are conducted.[4] In particular, the requirement of advance notice ensures that the union has an opportunity to communicate with employees prior to the poll. If the union is still concerned that the poll will not be conducted in a proper manner (See AFL-CIO Amicus Br. 22-24), it is free to petition the Board for an election, before or after the employer poll.[5]

C. Polling reveals facts employers have a right to use.

Plainly, it is not the *process* of conducting a poll, but the *results* of the poll, that really poses a risk to unions. The source of that risk, however, is not the employer; it is the employees. In this regard, the Board's limitation on polling is extraordinary, for it limits access to facts by a means that in other circumstances (a non-union setting) is not only permitted, but for which the Board has prescribed procedures. *Struksnes, supra.* A limitation on polling might make sense if the employer had no legitimate use for the facts. But the exact opposite is true. It is

[4] The ALJ found that Petitioner complied with those guidelines. (Pet. App. 56-60.) The Board found it unnecessary to decide whether Petitioner provided sufficient advance notice of the poll to the Union (Pet. App. 26, n. 9), but found no procedural violation, as alleged in the Complaint. (Pet. App. 56.)

[5] A petition for a Board election would block an employer poll. *Struksnes Construction Co.*, 165 N.L.R.B. at 1063.

entirely legal for an employer to withdraw recognition from a union that has lost majority status.

D. Preserving minority unions is not the ultimate goal of the Act.

To justify its restrictive policy, the Board argues that its policy promotes "stability in collective bargaining relationships," which the Board views as the "ultimate goal of the Act." (Bd. Br. 8.) However, ensconcing unions that have lost majority support is not a purpose of the Act. If it were, the presumption of continued majority support would be irrebuttable. Rather, the goal of the Act is to "promot[e] stability in collective-bargaining relationships, without impairing the free choice of employees." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987), *quoting, Terrell Machine Co.*, 173 N.L.R.B. 1480 (1969), *enf'd*, 427 F.2d 1088 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970).

The presumption of continued majority support is not only rebuttable, but relatively vulnerable. It gives way not only to proof that the union does not in fact enjoy majority status, but also to good-faith reasonable *doubt* of the union's support. Accordingly, Petitioner submits that the policy of stability underlying the presumption of majority support is not so forceful as to restrict the collection, by accurate and otherwise legitimate means, of evidence of what employees really want.[6]

[6] In addition, if, as Petitioner shows below, the Board has in practice silently abolished the good-faith doubt standard, and requires proof of actual loss of majority support in all cases,

The empirical foundation for the presumption of majority support may be especially weak when the employer is a successor. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 58 (Powell, J. dissenting). The notion that employees would ignore the difference between Mack Trucks, Inc. and Allentown Mack underestimates their economic rationality. Allentown Mack employees had no reason to doubt that they would be treated fairly by their new employer, had nothing to gain by putting pressure on their fledgling employer to pay more, and stood to save $420 per year apiece by not paying union dues. Because Allentown Mack's employees never before had an opportunity to decide whether to bargain collectively with their new employer, it cannot be said that the presumption of majority support in any way gave effect to employee choice. From the employees' perspective, the situation was similar to the organizational phase, in which employer polling is freely permitted to test a demand for recognition.

Recognizing that the presumption may have little empirical support, the Board also explains the application of the presumption as a policy decision, designed to permit the union to bargain for a new contract without worrying about obtaining immediate results and, in the case of a successor, to develop a relationship with the new employer. *Fall River Dyeing & Finishing*, 482 U.S. at

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then it should not bar access, by the only practical means available, to such proof. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 797, 798 (1990) (Rehnquist, C.J., concurring; Blackmun, J., dissenting). The lesser standard adopted by three courts of appeals is, in this light, an effort to revitalize the good-faith reasonable doubt standard.

39.[7] Because of the contract bar rule, the only time a union can lose its bargaining rights is when the contract is up for negotiation. Thus, there will always be some tension between the union's interest in negotiating a new contract (and gaining the protection of a new contract bar) and the need to provide an outlet for employee choice. In the successor context, the policy of stability remains vulnerable to the possibility that employees do not want the union to develop a relationship with the new employer in the first place.[8]

E. Petitioner's arguments cannot be dismissed on the grounds that they were made by an employer.

The Board criticizes Petitioner for seeking to act "as its workers' champion" against "their" union, as if "the free choice of employees" were a statutory policy only the Board or unions are permitted to cite. (Bd. Br. 22.) The policy of free choice is central to the Act. Employers have

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[7] In that case, the Court noted that a successor employer can withdraw recognition based on good-faith doubt of the union's majority status or proof of loss of majority status. It then added, "Moreover, an employer, unsure of a union's continued majority support, may petition the Board for another election." 482 U.S. at 41, n.8. The problem, of course, is that to obtain an election, the employer must be sufficiently "unsure" as to enable it to withdraw recognition unilaterally.

[8] As *Auciello, supra*, demonstrates, there is no ideal moment to withdraw recognition from a union. The timing ultimately depends on when employees create doubts about their continued support for the union. Once they do, an employer must act promptly.

a strong and legitimate interest in seeing that the Board does not violate it by imposing, on both employers and employees, minority unions.[9]

In this case, if Petitioner is not representing its employees' interest (as well as its own, the two being demonstrably congruent), it is difficult to see who else is representing that interest. It certainly is not the Union, which was rejected by a vote of 19 to 13 in a secret ballot poll and which has not sought another election in the six years since then. Nor is it the Board, which is attempting to impose on the employees the same Union.

F. Decertification is not the only option.

The Board's alternative would be to provide the employees no "champion" and to leave them to protect their own interests in self-determination by filing a decertification petition (RD petition).[10] (Bd. Br. 22.) However,

[9] The Board argues that the employer's concerns are alleviated by providing a defense against an unfair labor practice charge that it unlawfully recognized a minority union. (Bd. Br. 21.) The employer's interests are not limited to avoiding liability in the unlikely event of such a charge. An employer's main interest is in receiving the benefit of the substantive policy of the Act, which says that it is not required to bargain with a minority union.

[10] Contrary to the Board's argument (Bd. Br. 22, n. 3) unfair labor practice charges block petitions automatically. The *NLRB Casehandling Manual (Part Two), Representation Proceedings* § 11730.1 states, "action on the petition will normally be suspended pending investigation of the charge." In certain kinds of charges, including refusal to bargain charges (which are typically filed by unions faced with decertification

under long-standing Board precedent, such petitions, which require employees to master a number of obscure Board rules, are not the only outlet for employee choice. Rather, employers are permitted to give effect to employee choice, by withdrawing recognition based on evidence that the union has actually lost majority status, or even on good-faith reasonable doubt that a majority continue to support the union. In this context, polling is simply a non-coercive and otherwise permissible means of ascertaining facts that an employer is completely privileged to use.

G. The Board's policy is not justified by reference to other policies.

Everyone would agree that it is better for an employer to allow employees to decide, in a secret ballot poll, whether to be represented, rather than to act unilaterally on the basis of the employer's doubts, however reasonable. The Board, unable to explain away the fundamental irrationality of using a single standard for polls and unilateral withdrawals of recognition, instead argues that its standard does not really render polling superfluous, because it is conceivable that an employer with good-faith reasonable doubt might wish to poll in order to acquire proof of loss of majority support.[11] (Bd. Br. 36-38.)

movements), the block is not lifted until the General Counsel denies an appeal of the Regional Director's dismissal of the charge, unless the Board specifically directs that it be lifted earlier. *Id.* at § 11730.3.

[11] In a footnote, the Board writes, "Similarly, if the union loses the poll and the employer withdraws recognition based on

In making that argument, the Board supposes that the good-faith reasonable doubt standard requires less evidence than proof of loss of majority support. (Bd. Br. 38.) While that is true in theory, in practice the Board has abolished the good-faith reasonable doubt test and demands proof of loss of majority support in all cases. See Section II, *infra*.

Moreover, it is irrational to use the same standard (regardless of what standard is chosen) for polling and withdrawals of recognition. The use of a single standard ensures that there is no incentive to seek more reliable information before taking drastic action.[12]

H. The Board appears to recognize that its current policy is problematic.

The Board's Brief refers to its policy as its "existing" or "current" approach, (Bd. Br. 4, 5, 14, 21, 42), discusses

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the poll results, the employer can defeat an unfair-labor-practice claim simply by showing that before the poll, it had a good-faith reasonable doubt regarding the union's majority (and not necessarily proof of an actual loss of majority support)." (Bd. Br. 38, n. 10.) If that is so (and Petitioner agrees that it should be so), the Petitioner should have prevailed in this case.

[12] The Board observes that the standard adopted by three courts of appeals creates another anomaly, by permitting polls based on less evidence than the Board requires for a Board-conducted RM election. (Bd. Br. 40, n. 12.) The only reason for that anomaly is the Board's irrational policy of requiring the same evidence for a Board-conducted election as for a unilateral withdrawal of recognition. The Board's General Counsel has proposed a change in the Board's policies in this area. (Bd. Br. 41.)

alternative proposals, (Bd. Br. 20, 41)[13] and repeatedly argues that the issues in this case should be remanded to the Board. (Bd. Br. 16, 17, 18, 29, 34, 35, 36, 39, 40, 41, 42.) Petitioner submits that the Board's unfair labor practice finding was based on a defective existing standard and should be denied enforcement, without a remand. If the Board wishes to develop new policies in the future, it can do so without Petitioner being involved.[14]

II. THE BOARD HAS SILENTLY ABOLISHED ITS GOOD-FAITH REASONABLE DOUBT STANDARD.

The Board seeks credit for continuing to apply the original understanding of the good-faith reasonable doubt standard, while at the same time arguing that it is a "rigorous, fact-specific" standard. (Bd. Br. 38.) The Board cannot have it both ways. Since the Board has chosen to represent that the original understanding of that standard remains alive, it should have given the Petitioner the

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[13] One proposal, to which the AFL-CIO's amicus brief devotes considerable attention, would bar unilateral withdrawals of recognition. The Board rule permitting unilateral withdrawals of recognition is long-standing, *Celanese Corp. of America*, 95 N.L.R.B. 664 (1951) and recently applied in *Auciello Iron Works, Inc. v. NLRB*, *supra*. It is still the law under which this case must be decided.

[14] It would not be fair to apply any newly developed standard to conduct that occurred in 1991. *See generally Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The Petitioner's poll was permissible under the original understanding of the good-faith reasonable doubt standard (See Section II, *infra*) which in effect was revitalized by the standard adopted by three courts of appeals.

benefit of that standard (literally, "the benefit of the doubt") in this case.

A. The Board tacitly abolished the good-faith reasonable doubt standard.

Good-faith reasonable doubt is not, under any standard English usage, a "rigorous, fact-specific" standard. It is, by its terms, the exact opposite. The Board's original description of the standard merely required good-faith and "some reasonable grounds" to believe the union had lost majority support. *Celanese Corp. of America*, 95 N.L.R.B. 664, 673 (1951). Under that standard, the evidence was considered cumulatively. *Id.* Application of that standard did not require any special expertise. "[T]he reasonableness of the employer's doubt must be determined on the basis of how a reasonable person would assess the probabilities." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 811 (1990) (Scalia, J., dissenting).

Although the Board professes to rely on the good-faith reasonable doubt test,[15] both courts and commentators have observed the Board's virtually exclusive reliance on "head counts." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. at 797, 800 (Rehnquist, C.J., concurring,

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[15] The Board's dictum in *Liquid Carriers Corp.*, 319 N.L.R.B. 317, 319 n.10 (1995), *enf'd*, 101 F.3d 691 (3d Cir. 1996), that it does not require proof of anti-union statements by each individual worker is no more persuasive than its argument in this case. In that case, the Board found that union opposition to retention of strike replacements did not create a good-faith reasonable doubt.

Blackman, J., dissenting);[16] *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d 1428, 1432 (10th Cir. 1990); Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U.L. Rev. 387, 394 (1995). Flynn, an author cited in the Board's Brief (Bd. Br. 20, 42), describes the Board's practice as follows:

> [W]ith respect to Labor Board policy, what you see is not necessarily what you get. Indeed, there is often a significant disparity between the Board's articulated adjudicative standard and its application of that standard. This dichotomy, which I will call the de jure/de factor gap, is typified by a test that sounds flexible, but the Board applies in a rigid, near-absolute fashion. Perhaps the best example of this phenomenon is the Board's standard regarding employer withdrawals of recognition.

Id. at 393-94 (footnotes omitted).

Although the Board professes to consider the totality of circumstantial evidence, in practice it picks the evidence apart and invokes counter-intuitive evidentiary rules that rule out most such evidence, piece by piece. *See e.g., Wallkill Valley General Hosp.*, 288 N.L.R.B. 103 (1988), *enf'd*, 866 F.2d 632 (3d Cir. 1989). For example, the Board will not normally consider decline in union membership or check-off authorizations, *Id.* at 108; non-participation

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[16] The Board's reliance on the majority opinion in *Curtin Matheson*, 494 U.S. at 788, n.8, is misplaced. The issue in that case was the Board's no-presumption approach to strike replacements. The majority in *Curtin Matheson* refused to *assume* that the Board had abandoned the good-faith doubt standard solely by adopting the no-presumption rule.

in a strike, *Id.* at 108; dissatisfaction with the quality of representation, *Century Papers, Inc.*, 284 N.L.R.B. 1151, 1154, 1158 (1987); inactivity by the union, *Petoskey Geriatric Village Inc.*, 295 N.L.R.B. 800, 804 (1989); and union demands to displace strike replacements, *Liquid Carriers*, 319 N.L.R.B. at 320.

The Board is equally hostile to direct evidence of anti-union sentiment. The Board views "with suspicion and caution" reports by employees concerning the views of others. *Wallkill Valley Hospital*, 288 N.L.R.B. at 109. As the Court of Appeals in this case stated, "The Board has consistently questioned the reliability of reports by one employee of the antipathy of other employees toward their union." (Pet. App. 11.)[17] To be considered, such evidence must be "specific and detailed." (Pet. App. 12.)

Having virtually ruled out circumstantial evidence and reports by employees concerning the views of others, practically the only evidence the Board will consider is statements by individual employees. Employers cannot, however, question employees individually about their support for the union. Even when employees make spontaneous statements, the Board is hostile to the evidence. As the Court of Appeals stated in this case, "Board precedent also holds that an employee's statements of dissatisfaction with the quality of union representation may not

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[17] Citing *Westbrook Bowl*, 293 N.L.R.B. 1000, 1001 n.11 (1989); *Louisiana Pacific Corp.*, 283 N.L.R.B. 1079, 1080 n.6 (1987), *Sofco, Inc.*, 268 N.L.R.B. 159, 160 n.10 (1983); *Bryan Mem. Hosp. v. NLRB*, 814 F.2d 1259, 1262 (8th Cir.), *cert. denied*, 484 U.S. 849 (1987); *NLRB v. Cornell of California, Inc.*, 577 F.2d 513, 516 (9th Cir. 1978).

be treated as opposition to union representation." (Pet. App. 10.)[18] "Employee statements offered to establish a reasonable doubt of the Union's majority status 'must demonstrate a clear intention by the employees not to be represented by the Union.' " *AMBAC International*, 299 N.L.R.B. 505, 506 (1990), *quoting Royal Midtown Chrysler Plymouth, Inc.*, 296 N.L.R.B. 1039 (1989).

In addition, the Board relies on burdens of proof that might be appropriate if the standard were certainty, but are misplaced when the issue is reasonable doubt. When the employer relies upon circumstantial evidence alone, "the evidence must establish with a reasonable degree of *certainty* that there is an objective basis for doubting that the majority of unit employees desire representation by the union." *Liquid Carriers*, 319 N.L.R.B. at 320 (emphasis added). The "employer's burden of establishing good-faith doubt is a heavy one." *Petoskey Geriatric Village*, 295 N.L.R.B. at 803. In *Laidlaw Waste Systems, Inc.*, 307 N.L.R.B. 1211 (1992), the Board wrote an absurdly self-contradictory decision. In that case, the Board overruled two prior decisions requiring that doubt be proved by clear and convincing evidence.[19] It held that the standard of proof is preponderance of the evidence. In the next paragraph of the same decision, the Board ruled that the

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[18] Citing *Destileria Serralles, Inc.*, 289 N.L.R.B. 51 (1988), *enf'd*, 882 F.2d 19 (1st Cir. 1989); *Wagon Wheel Bowl, Inc. v. NLRB*, 47 F.3d 332, 335-36 (9th Cir. 1995).

[19] The Board overruled *Westbrook Bowl*, 293 N.L.R.B. 1000, 1001 (1989) and *Hutchinson-Hayes International, Inc.*, 264 N.L.R.B. 1300 (1982). Compare, *Bolton-Emerson, Inc.*, 293 N.L.R.B. 1124 (1989) (preponderance of evidence standard applied), *enf'd*, 899 F.2d 104 (1st Cir. 1990).

evidence introduced to support a good-faith reasonable doubt still must be "clear, cogent and convincing." *Id.* at 1211-12.

The Board's undeclared war on the good-faith doubt standard is sufficiently apparent to Board insiders that in one recent case, *Alcon Fabricators*, 317 N.L.R.B. 1088 (1995), *vacated and remanded*, 1997 U.S. App. LEXIS 10646 (6th Cir. 1997), the ALJ concluded that the good-faith reasonable doubt defense was no longer available. Although the Board dropped a footnote disclaiming reliance on the ALJ's discussion of the "continued viability of the good-faith-doubt defense," 317 N.L.R.B. 1088, n.2, it adopted his conclusions without further discussion.

B. The Board's departure from precedent is exemplified by its treatment of the evidence in this case.

Rather than acknowledge that it has, in practice, silently abolished the good-faith reasonable doubt standard, the Board has chosen to make the representation that the original understanding of that standard remains alive, citing a line of cases in which employers successfully made the required showing. (Bd. Br. 31, n.8.)[20] If the Board wishes to be taken at face value in making that representation, then, based on precedent cited by the

[20] The most recent decision cited by the Board in support of its argument that employers can successfully make the required showing by anything other than a strict head count was issued in 1984. (Bd. Br. 31, n. 8.)

Board, the evidence in this case was surely sufficient to establish a good-faith reasonable doubt. See *J & J Drainage Prods. Co.*, 269 N.L.R.B. 1163 (1984), cited by the Board to prove that employers can successfully show good-faith reasonable doubt. (Bd. Br. 31, n. 8.)

In this case, the Board described Shop Steward Ron Mohr's conversation with Robert Dwyer, President of Petitioner, as follows:

> In December, prior to the interview process, Dwyer and employee and union steward for the service employees, Ron Mohr, engaged in a conversation in which the Union was discussed. Dwyer remembers it taking place in the shop and beginning by Dwyer asking how things were going. He said Mohr told him that with a new company, if a vote was taken, the Union would lose and that it was his feeling that the employees did not want a union. Dwyer replied that it was up to the employees and he would go either way.

(Pet. App. 53.) Based on those facts, the Board found that "Respondent could not rely on Mohr's statement as a basis for doubting the Union's majority status." (Pet. App. 24.)

In *J & J Drainage*, the Board made these findings:

> On either February 23 or 24, 1981, Smith [VP and General Manager of the employer] had a conversation with Pinkston [shop steward] in the culvert shop at the Hutcheson facility. Smith testified, "I had asked Mrs. Pinkston, just in general conversation, how things were going, and she indicated to me that Mr. Daugherty [union official] had called her and had indicated

> that he would like to arrange a meeting in Hutchinson so he could visit with the people, and that she had told him that it really wasn't necessary because the people were not interested in the Union."

269 N.L.R.B. at 1167. Based on those facts, the Board found, "The fact that Pinkston was one of the two union stewards at the plant [the same as Mohr], and the fact that the unit was relatively small with 32 employees [the same number as Petitioner] both are matters which would warrant giving Pinkston's comment more weight." 269 N.L.R.B. at 1171. The Board concluded that the employer "may rely on her statement in support of the Respondent's reasonable doubt." *Id.*

Apart from the shop steward's statement, there was far more evidence of disaffection for the Union in this case than in *J & J Drainage*.[21] The Board attempted to distinguish *J & J Drainage* on the grounds that the shop steward's statements in that case were made three days after the successor employer took over the plant. (Pet. App. 27, n. 7.) In this case, the steward's statements were made before the sale took place. It is difficult to see why that should make a difference, especially in view of the Board's oft-cited presumption that union sentiment carries forward.

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[21] The only other evidence of anti-union sentiment in that case was that the union had few dues paying members, a factor that generally can arise only in a right-to-work state and which the Board normally accords no weight. Here, there were statements from other employees casting doubt on their support for the union.

In sum, the Board should be required to live up to its representations. If, as the Board argues, *J & J Drainage* represents the proper application of the good-faith reasonable doubt standard, then Petitioner had a right to conduct a poll.

CONCLUSION

For the reasons set forth above, and in the Petitioner's opening Brief, Allentown Mack respectfully requests that the Court reverse the decision of the United States Court of Appeals for the District of Columbia Circuit and remand with instructions to deny the Board's application for enforcement.

Respectfully submitted,

EARLE K. SHAWE*
STEPHEN D. SHAWE
ERIC HEMMENDINGER
ELIZABETH TORPHY-DONZELLA
SHAWE & ROSENTHAL
Sun Life Building
20 S. Charles Street
Baltimore, MD 21201
(410) 752-1040

* *Counsel of Record*

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No. 96-795 (6)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE LABOR POLICY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBERT E. WILLIAMS *
DANIEL V. YAGER
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 789-8600
Attorneys for Amicus Curiae Labor Policy Association

* Counsel of Record

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BRIEF OF THE LABOR POLICY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Labor Policy Association respectfully submits this brief as *amicus curiae* with the written consent of the parties.* The brief urges the Court to reverse the decision below and thus supports the position of the petitioner.

INTEREST OF THE *AMICUS CURIAE*

The Labor Policy Association (LPA) is an organization of the senior human resources officers of over 250 of the nation's largest private sector employers,

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* Letters of consent from the parties have been filed with the Clerk of the Court.

collectively employing more than 12 million Americans. Since its founding in 1939, LPA has been concerned exclusively with the development and implementation of laws and public policies relating to employment. LPA's mission is to ensure that the laws and policies affecting human resource practices in the private sector are sound, practical, and responsive to the realities of the modern workplace.

All of LPA's members are employers subject to the National Labor Relations Act (NLRA or the Act), 29 U.S.C. §§ 151 *et seq.* Moreover, many LPA companies have in the past been, and will continue to be, successor employers of unionized workers. As such, LPA members are deeply concerned about the National Labor Relations Board's (NLRB or the Board) inconsistent and irrational application of federal labor policy in this case, whereby the Board imposed upon the parties a collective bargaining relationship that neither the workers nor management desired.

Because of its interest in the development of the nation's labor laws, LPA has participated as *amicus curiae* in cases before this court, the United States Courts of Appeals, the United States District Courts, and the National Labor Relations Board. *E.g., NLRB v. Town & Country Elec.*, 116 S. Ct. 450 (1995) (whether union "salts" are employees under the NLRA); *Electromation v. NLRB*, 35 F.3d 1148 (7th Cir. 1994) (whether employee committees violate Section 8(a)(2) of the NLRA); *Gleoge v. Albertson's Inc.*, No. C96-3384 (N.D. Cal.) (decision pending) (enforceability of collectively-bargained agreeemnts to arbitrate statutory claims); *Jeffboat Div., American Commercial and Marine Serv. Co., et al.*, 9-UC-406 (NLRB) (decision pending) (employee/independent contractor distinction under the NLRA).

Thus, LPA has an interest in, and familiarity with, the issues and policy concerns presented in this case. Indeed, because of LPA's membership, it is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

The facts of the case are set out fully in Petitioner's brief.

SUMMARY OF ARGUMENT

In this case, Petitioner had a good-faith, reasonable doubt about the union's majority status prior to its decision not to bargain. In fact, Petitioner had conclusive and reliable proof that 59% of the employees in the bargaining unit no longer desired to be represented by the union. Faced with these circumstances, the Board applied a series of inconsistent and irrational rules which systematically "discredited" the evidence on which the employer based its good-faith reasonable doubt.

The patchwork of inconsistent and irrational actions that the Board took in order to reach its desired result in this case includes: applying a facially irrational rule that prohibits polling of employee sentiments except when it serves no purpose; applying a contradictory pair of rules that simultaneously require verification of individual employee sentiments and also prohibit verification of individual employee sentiments; applying rules that are inconsistent with precedent; inexplicably counting an employment position that two individuals shared as in favor of the

union when both employees had made unequivocal statements to the contrary; and imposing, without explanation, an extraordinary remedy—the bargaining order—in the face of circumstances that clearly call for judicial restraint.

In an attempt to reconcile its irrational application of federal labor policy, the Board purports to rely on an interpretation of the NLRA that exalts "industrial stability" as "*the ultimate goal* of the Act," (Res. Br. in opposition to *petition for cert.* at 8) (emphasis added), while utterly ignoring the goal of employee freedom of choice—an interpretation that has no basis in the Act, and which the Board, itself, applies only inconsistently and selectively.

Finally, the Board rationalizes the application of these incongruous rules as necessary to preserve its preference for formal Board-conducted elections. Again, however, the Board's inconsistent and selective application of this "preference" for formal elections (i.e. applying the preference only in the context of withdrawal of recognition, not during organizing campaigns) undermines the merits of its argument here.

ARGUMENT

I. A Board Decision That is Irrational or Inconsistent With the Purposes of the NLRA Deserves No Deference

Because Congress delegated to the NLRB primary responsibility for developing and applying the nation's labor policies, decisions of the agency are normally accorded deference.

> If the Board adopts a rule that is rational and consistent with the [NLRA], then the rule is entitled to deference from the courts. Moreover,

> if the Board's application of such a rational rule is supported by substantial evidence on the record, courts should enforce the Board's order.

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987). This deference is not without its limits, however. This Court has made it clear that it will not defer "to Board decisions which are irrational or inconsistent with the [NLRA]." *NLRB v. Financial Institution Employees, Local 1182*, 475 U.S. 192, 202 (1986). "These principles . . . guide [this Court's] review of the Board's action in a successorship case," 482 U.S. at 42, such as the one here.

II. The Board's Application of Federal Labor Policy in This Case is So Unreasonable and Inconsistent That the Resulting Decision Is Entitled to No Deference

The Board's decision in this case is so permeated with irrationalities and inconsistencies that it cannot possibly be considered the product of reasoned decision-making.

Two of the difficulties with the Board's decision—namely, that the Board's polling standard is irrational on its face and that the decision is inconsistent with NLRB precedent—have been briefed persuasively by Petitioner and will not be repeated at length here.

Under the Board's policy, an employer may poll its employees regarding their support for the union only when the employer has already accumulated enough evidence of employee dissatisfaction to justify unilateral withdrawal of recognition. Thus, the policy prohibits polling except when polling serves no purpose. Suffice it to say that this rule was rejected as irra-

tional by the first three circuits to consider it,[1] *see Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295 (9th Cir. 1984); *Thomas Industries, Inc. v. NLRB*, 685 F.2d 863 (6th Cir. 1982); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981), characterized as "peculiar" by a fourth circuit court, see *NLRB v. Albany Steel*, 17 F.3d 564 (2d Cir. 1994), questioned by two Justices of this Court, see *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 797, 799 (1990) (Rehnquist, C.J., concurring; Blackmun, J. dissenting), and repudiated by one member of the Board itself, *see Texas Petrochemicals Corp.*, 296 NLRB 1057, 1064 (1989) (Chairman Stephens dissenting).

Likewise, the Board's ruling is inconsistent with its own precedent. As Petitioner points out, even if it were rational to use the same standard for polling and withdrawal of recognition, the decision in this case would be inconsistent with Board precedent. The Board previously has established a rule that an employer can withdraw recognition "*either* by showing that the union in fact lacks majority support *or* by demonstrating a sufficient objective basis for doubting the union's majority status." *Curtin Matheson Scientific*, 494 U.S. at 787 (emphasis added). *See also id.* at 800-01 (Blackmun, J., dissenting) (The Board has not purported to overrule the good-faith doubt defense); *id.* at 801 (Scalia, J., dissenting) ("The [NLRB] has established as one of the central

[1] As explained more fully by Petitioner, the polling rule is irrational because it permits employer polling only when it is pointless, its standards change when used in the context of organizing, and it encourages conduct that is contrary to the purpose of the Act.

factual determinations to be made in § 8(a)(5) unfair-labor-practice adjudications, whether the employer had a reasonable, good faith doubt concerning the majority status of the union at the time it requested to bargain.")

By requiring unequivocal proof, in the form of a head count, that a majority of bargaining unit employees no longer support the union in order to establish a reasonable good-faith doubt, the Board merges, and consequently destroys, its two-prong, disjunctive test. An administrative agency may not make policy in such a manner.

> Despite the fact that the NLRB has explicit rulemaking authority, it has chosen—unlike any other major agency of the Federal Government—to make almost all its policy through adjudication. It is entitled to do that, but it is not entitled to disguise policymaking as factfinding, and thereby to escape the legal and political limitations to which policymaking is subject. Thus, when the Board purports to find no good-faith doubt because the facts establish it, the question for review is whether there is substantial evidence to support that determination.

Curtin Matheson Scientific, 494 U.S. at 819 (Scalia, J., dissenting) (citations omitted).

The infirmity in the Board's decision does not end here, however. The two difficulties discussed above are just the vanguard in an onslaught of inconsistencies, illustrated below, which form the foundation of the Board's decision in this case.

A. The Board's Decision Is the Product of a Series of Inconsistent Rules That Simultaneously Establish a Standard and Make that Standard Unattainable

The incompatible set of rules on which the Board has relied to reach its desired result in this case already has been identified by members of this Court. As the Chief Justice noted,

> I have considerable doubt about whether the Board may insist that good-faith doubt be determined only on the basis of the sentiments of individual employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments. But that issue is not before us today.

Curtin Matheson Scientific, 494 U.S. at 797 (Rehnquist, C.J., concurring). And Justice Blackmun agreed,

> I am also troubled by the fact . . . that while the Board appears to require that good-faith doubt be established by express avowals of individual employees, other Board policies make it practically impossible for the employer to amass direct evidence of its workers views.

Id. at 799 (Blackmun, J., dissenting) (citation and footnote omitted).

Although this blatant inconsistency in Board policy was not the issue in *Curtin Matheson Scientific*, it cannot avoid the Court's scrutiny here, because the Board has relied too heavily on the contradictory rules in order to achieve its desired result.

One of the more telling illustrations of the absurd application of these rules in this case is found within a single paragraph of the decision of the administrative law judge (ALJ). In discounting the statement by Ron Mohr concerning widespread opposition to the union, the ALJ relied on "the Board's historical treatment of unverified assertions." (Pet. App. at 55.) This reasoning would have some meaning if the Board in fact allowed verification. But not more than a few lines down, the ALJ recognized the Board's other policy, which forbids polling employees about their sentiments until the loss of majority status is already otherwise established, or in other words, until the employer already has verification of its employees' sentiments.

Neither the ALJ nor the Board actually explicate the NLRB's historical aversion to unverified assertions. They merely indicate that it is so. This would not be especially troubling if the Board did not turn around and recount its historical *acceptance* of unverified employee assertions as a means of distinguishing other evidence in this case.

For example, in distinguishing Mohr's statement on the grounds that it is only representative of the sentiments of the pre-sale employees, the Board cites *J & J Drainage Products*, 269 NLRB 1163 (1984), where the Board relied on the *unverified* statements of a shop steward. (Pet. App. at 23.)

Likewise, in discarding the general statements concerning loss of union support made by Mohr and Bloch,[2] the Board cites *Naylor, Type & Mats*, 233

[2] The Board discounted the statement by Mohr that "with a new company, if a vote was taken, the union would lose and that it was his feeling that the employees did not want a union." (Pet. App. at 53-54.) The Board discounted Bloch's statement that "the entire night shift did not want a union." (Pet. App. at 51.)

NLRB 105 (1977), where the Board relied on more specific, but equally *unverified* assertions by two employees.[3] (Pet. App. at 24-25.)

The Board may be allowed to claim an historical aversion to unverified assertions; or, it may be permitted to claim an historical acceptance of unverified assertions; but it ought not, in the same case, be permitted to enjoy both positions without a reasoned explanation.

The Board's discussion of *Naylor* raises another disturbing inconsistency. In an effort to distinguish the instant case from *Naylor*, the Board appears to have endorsed an entirely new, yet equally irrational polling policy. The Board emphasized that in *Naylor*, "the employer could rely on remarks by two employees that they had actually taken head counts and enumerated the employees who supported and who opposed the union." (Pet. App. at 24-25.) That is a poll. The Board's preference for the *Naylor*-type poll —which was undertaken without *Struksnes* safeguards,[4] and tallied and reported without disinterested supervision—over the *Struksnes* poll which the employer conducted here, was left unexplained by the Board and is nothing short of irrational.

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[3] To the extent that the Board equates specificity with verification, its reasoning is entirely without merit. The mere recitation of employee names provides no verification for the employer that the sentiments of those employees are being reported accurately.

[4] *Struksnes Construction Co.*, 165 NLRB 1062 (1967), establishes the minimum safeguards that are required for a permissible poll. The Board acknowledged that the poll conducted by Petitioner in this case satisfied those requirements.

B. The Board Inexplicably Counted the Position Shared by Dennis Wehr and Randy Zoltack as an Employee Presumptively in Favor of the Union Even Though Both Employees Opposed the Union

The Board's treatment of the position occupied by Dennis Wehr prior to January 25, 1991, and Rudy Zoltick after that date, is especially puzzling.

Employee Dennis Wehr stated that "we didn't have to have a union because we didn't need one." (Pet. App. at 49.) The ALJ, after finding that such a statement would "properly cause an employer to doubt th[e] employee's support for the union," nonetheless discounted the evidence because Wehr quit on January 23, 1991, two days before Petitioner responded to the union's request for bargaining. (*Id.*) On the other hand, the statement by Randy Zoltack—the employee hired to replace Wehr—that "the Union was a waste of $35," (*id.* at 51), was discounted because Zoltack was hired *after* January 25, 1991.

The irrationality of the Board's conclusion regarding Wehr and Zoltack goes even deeper than its facial inconsistency, however. Because even though the Board refused to count the sentiments of either of these individuals, it nonetheless counted the employment position that they shared in determining the size of the bargaining unit.[5] Thus, not only did the Board fail to count these individuals as opposed to the union, it inexplicably counted the Wehr/Zoltack position as an employee presumptively *in favor* of the

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[5] The Wehr/Zoltack position was one of the 32 that the Board counted in the head count. This is evident from the fact that the Board used the poll results, 19 to 13, to determine the size of the bargaining unit, and the fact that Zoltack voted in the poll.

union.[6] This absurd result is explainable only as an inevitable by-product of the Board's application of contradictory and irrational rules.

C. The Issuance of a Bargaining Order Further Demonstrates The Board's Irrational Application of Federal Labor Policy

The issuance of an affirmative bargaining order, as opposed to an order to cease and desist from refusing to bargain—whether or not foreclosed from challenge by the exhaustion doctrine—nonetheless demonstrates the Board's irrational application of federal labor policy in this case.

The Court of Appeals for the District of Columbia Circuit has explained the difference between an order to cease and desist from refusing to bargain and an affirmative bargaining order. *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243 (D.C. Cir. 1994).[7] The cease and desist order simply puts the parties back in the position they would have been absent any violations, and does not affect the employees right to decertify the union at a later date. The affirmative bargaining order, on the other hand, is accompanied by a prohibition against decertification. *Id.* at 1248. As a result, affirmative bargaining orders can interfere with the central protection conferred by the Act—employee free choice. *Id.; NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 230 (2d Cir. 1983).

[6] As an interesting side note, under the Board's reasoning, the Wehr/Zoltack position becomes an employee that is *conclusively* presumed to be in favor of the union. Since each is excluded on the grounds of timing, there is no statement that either could have made which would have rebutted the presumption.

[7] LPA contends that no remedies are appropriate in this case because the employer had a reasonable good-faith doubt about the union's majority status and therefore did not violate the Act by withdrawing recognition. Nonetheless, the Board's unreasonable preference for an affirmative bargaining order over a cease and desist order after finding a violation further illustrates its irrational approach to this case.

It is for this reason that the affirmative bargaining order is characterized as an extraordinary remedy which is subject to special restraints. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969) (appropriate only when employer misconduct has impaired employee free choice). It is also for this reason that courts require the Board "to explain that it has balanced the often competing interests of union protection and employee choice before issuing a bargaining order." *Exxel/Atmos*, 28 F.3d at 1248.

Thus, the Board's imposition of such an extreme remedy under the circumstances of this case is curious, because the employees have chosen freely and clearly not to be represented by the union. It is in this kind of situation that the Board must provide a well reasoned explanation.

The Board has provided no such explanation, however. Instead, it buries in a footnote the following "boilerplate" language:

> To remedy the Respondent's unlawful refusal to recognize and bargain with the Union, the judge imposed an affirmative bargaining order. In exceptions, the Respondent argues only that it did not violate the Act, not that the bargaining order is an appropriate remedy for an unlawful refusal to recognize and bargain with an incumbent union. In any event, an affirmative bargaining

> order is the standard Board remedy for such a violation.

(Pet. App. at 27) (citations omitted).

The Board's explanation is arbitrary and capricious on its face. *See e.g. Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995) (an agency explanation which consists only of boilerplate language unrelated to the specific facts of the case is arbitrary and capricious). Moreover, when considered in conjunction with the specific circumstances of this case, the explanation is blatantly irrational, for it attempts to justify the imposition of an extreme and unwarranted remedy with little more than a statement to the effect: we impose this order because we can.

III. The Board's Attempt to Justify Its Inconsistent and Irrational Decision Is Without Merit

In this case, the substantial evidence taken as a whole supports only one conclusion—that Petitioner had a reasonable, good-faith doubt about the majority support for the union. The series of inconsistent and irrational rules that the Board applied to "discredit" evidence of loss of support does not change this result. Nevertheless, even when a court is not,

> so certain of the wrongness of an agency's empirical judgment that it will be justified in substituting its own view of the facts . . . courts can and should review agency decisionmaking closely to ensure that an agency has adequately explained the basis for its conclusions, that the various components of its policy form an internally consistent whole, and that any apparent contradictions are acknowledged and addressed.

Curtin Matheson Scientific, 494 U.S. at 800 (Blackmun, J., dissenting).

The Board justifies its irrational approach to this case mainly on the grounds of "industrial stability." The Board relies on *Fall River Dyeing*, 482 U.S. at 39, to explain that its actions are "consistent with the statute's goal of promoting stability in bargaining relationships." (Res. Br. in Opposition to *Petition for Certiorari* at 11.) "The Board has concluded that its 'reasonable doubt' standard for polling is more consistent with the ultimate goal of the Act—stability in collective-bargaining relationships—than is the less stringent standard favored by the courts of appeals . . ." (*Id.* at 8.) The Board's rationale is unpersuasive for several reasons.

First, its reliance on *Fall River Dyeing* is misplaced. There, this Court recognized the principle that the presumption of majority support "premot[es] stability in collective bargaining relationships, *without impairing the free choice of employees.*" *Fall River Dyeing*, 482 U.S. at 39 (emphasis added). Here, however, in the name of industrial stability, the Board has applied a series of rules that clearly impair employee free choice.[8] Thus the "industrial peace" which this Court discussed in *Fall River Dyeing* in no way justifies the Board's unreasoned approach in this case.

Furthermore, although the Board purports to be guided by the principles of "industrial stability,"

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[8] Petitioner has thoroughly discussed how the Board's polling standard, when viewed in conjunction with the labyrinth of Board rules concerning decertification petitions, impairs employee free choice.

in actuality it applies only the principles of "union stability."

For example, the Board asserts that "polls, the Board has found, are 'potentially, if not inherently, both disruptive of the collective-bargaining relationship between an employer and a union and also unsettling to the employees involved . . .'." (Res. Br. in Opposition to *Petition for Certiorari* at 11.) Yet the Board's polling standard does not purport to eliminate the use of these "de-stabilizing" polls completely; it simply eliminates an employer's use of them to test an incumbent union's majority. The Board continues to permit the use of polls to measure union support during organizing campaigns. *See Mingtree Restaurant*, 736 F.2d at 1298 ("we find it incongruous for the Board to grant the right to conduct polls of union sentiment during the crucial organizing period and effectively deny that right after the union has been recognized"). The Board has not explained how polls have only this selective de-stabilizing effect.

In addition, although the Board purports to have applied the principle of "industrial stability" in determining the merits of the case, it clearly abandoned those principles in formulating a remedy. How imposing upon workers and management a relationship that neither desires will further industrial stability is nothing short of a mystery.

Finally, the Board attempts to justify its polling standard on the grounds that it "avoids an anomaly that would exist if a less stringent rule were adopted for polling . . . than that for a full scale, formal Board-conducted RM election." (Res. Br. in Opposition to *Petition for Certiorari* at 9.) Yet, again, the Board's

rule does not purport to avoid this "anomaly" completely; it only avoids it to the extent that it favors unions. For example, the Board already permits such an anomaly to exist in organizing campaigns. As discussed above, the Board permits polls to be taken to determine union support during organizing. It also allows an employer to recognize a union voluntarily without a representation election when the employer believes the union has majority support based entirely upon union authorization cards signed in the presence of union officials. Thus, in the organizing context, the Board maintains no preference for elections. On the contrary, with respect to organizing, the Board appears to be headed away from formal secret ballot elections.[9] Thus, the only real anomaly in the Board's policy is in requiring so much more to obtain a chance to test an incumbent union's status than a non-incumbent union's, whether through polling or Board-conducted elections. The Board's selective "preference" for formal elections (i.e. preferred only during challenges to incumbent unions) is unpersuasive.

The Board's selective application of the principles of "industrial stability" and "preference" for elections do not adequately reconcile or explain its irra-

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[9] For example, the Board has strongly endorsed the use of mail ballots. Testimony Before the Senate Labor and Human Resources Committee (Sept. 17, 1996), *reprinted in*, Daily Lab. Rep. (BNA) No. 181, E-4, 6 (Sept. 18, 1996) (statement of William B. Gould, IV, NLRB Chairman). In addition, the Chairman has indicated his preference for union certification based on authorization cards as opposed to certification based on secret ballot elections. William B. Kould IV, Agenda for Reform, The Future of Employment Relationships and the Law 177 (MIT Press 1993).

tional approach in this case. On the whole, the Board's actions lead to the inescapable conclusion that the decision in this case was result-driven. Alone, this is bad enough—but it is especially troubling when the imposed result is wrong, and the correct result is known—19 to 13 against the union.

CONCLUSION

For the reasons stated herein, LPA respectfully submits that the decision of the District of Columbia Circuit in this case should be reversed, and the Board's order set aside.

Respectfully submitted,

ROBERT E. WILLIAMS *
DANIEL V. YAGER
McGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, DC 20005
(202) 789-8600
Attorneys for Amicus Curiae
Labor Policy Association

April 17, 1997

* Counsel of Record

(7)

No. 96-795

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZEIBERG
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN S. IRVING
Counsel of Record
CHRISTOPHER LANDAU
JEFFREY BOSSERT CLARK
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the largest federation of business companies and associations in the world. With substantial membership in each of the fifty States, the Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, in every sector of business, and in every region of the country. The Chamber thus serves as the principal voice of the American business community.

One of the Chamber's principal functions is to represent the interests of its members in important matters before the courts of the United States, and especially this Court. The Chamber has sought to fulfill that function by filing briefs

amicus curiae in cases of importance to the business community, including cases (like this one) involving labor relations.[1]

This case presents an issue of particular legal and practical importance: when may an employer lawfully conduct a poll of its employees to ascertain whether an incumbent union continues to enjoy majority support? The National Labor Relations Board has announced and applied a standard whereby an employer cannot conduct such a poll unless it first knows the result. That standard essentially bans employer-sponsored polls and makes it practically impossible for an employer to challenge an incumbent union's presumption of majority support. The Chamber's members have a vital interest in defending their right to rebut this presumption and in clarifying this now-confused area of the law.

This brief is filed with the consent of both parties, and letters reflecting such consent have been filed with the Clerk of this Court.

STATEMENT OF THE CASE

Petitioner Allentown Mack Sales and Service, Inc., is a company established in December 1990 by three former managers of the Mack Truck dealership in Allentown, Pennsylvania. *See* Pet. App. at 2a. The new company hired 32 of its predecessor's 45 employees. *See id.* All of these employees had previously been represented by a union, Local Lodge #724, International Association of Machinists and Aerospace Workers, AFL-CIO. *See id.* at 2a, 40a.

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[1] *See, e.g., Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

During the period immediately before and after the sale, seven of petitioner's employees indicated to management that they no longer supported the union. One of these employees stated that the "entire night shift" (consisting of five or six employees) did not want the union. *See id.* at 14a, 51a. Another employee (a union shop steward) stated that the employees did not need a union. *See id.* at 14a. Yet another employee, who was a member of the union bargaining committee and the shop steward for the 23-member service department, stated that "'with a new company, if a vote was taken, the union would lose and that it was his feeling that the employees did not want a union.'" *Id.*

Based on these statements, petitioner postponed recognition of the union "until further investigation." *Id.* at 30a. It then polled its employees to determine whether a majority supported the union. *See id.* at 44a, 58a. The poll was supervised by a Roman Catholic priest, and complied fully with the procedural safeguards established by the National Labor Relations Board. *See id.* at 2a, 58a-60a.

The employees rejected the union by a 19-to-13 margin. *See id.* at 2a, 14a, 44a. Accordingly, petitioner withdrew recognition from the union. *See id.* at 2a. The union responded by filing unfair labor practices charges with the Board. *See id.*

The Board held that the poll violated § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). *See id.* at 26a n.9. The Board did not contest the poll's fairness or accuracy, *see id.* at 25a-26a, 58a-60a, but held instead that it violated the Act because petitioner did not have sufficient evidence of loss of union support to justify a poll in the first place, *see id.* at 25a-26a. The Board based this conclusion on its precedents holding that the same standard governs an employer's ability to poll its employees as to withdraw recognition from an incumbent union. To satisfy that standard in either context, according to the Board, an employer must have a good-faith doubt regarding the union's majority status.

See id. at 25a-26a & n.9 (citing *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1058-63 (1989)). Because a majority of petitioner's employees had not specifically informed management that they opposed the union, the Board held that petitioner lacked such doubt. *See* Pet. App. at 21a-26a. The Board further asserted that "because the poll itself was an unfair labor practice, [the employer] could not lawfully rely on the results of the poll in declining to recognize the [u]nion." *Id.* at 27a. Accordingly, the Board held that petitioner's withdrawal of recognition was also unlawful and ordered the company to bargain with the very union rejected by a majority of its employees. *See id.* at 27a, 62a-63a.

A divided panel of the U.S. Court of Appeals for the D.C. Circuit enforced the Board's order. *See id.* at 1a-18a. The panel majority expressly rejected the decisions of three other Courts of Appeals, all of which had refused to enforce the Board's polling standard. *See id.* at 3a-8a. The dissenting judge noted that the Board's standard led to the "bizarre result" that "an employer cannot conduct a poll to determine majority support unless it already has so much evidence of no majority support as to render the poll meaningless." *Id.* at 15a.

SUMMARY OF ARGUMENT

This case highlights an inherent conflict among several strands of federal labor law developed by the National Labor Relations Board. *First*, the Board has long acknowledged an employer's right to poll its employees in a non-coercive manner to determine their level of union support. *Second*, for more than half a century, the Board has recognized an employer's right to withdraw recognition from an incumbent union on the basis of a "good-faith doubt" regarding the union's majority status. But *third*, and at issue here, the Board in recent years has held that an employer cannot lawfully conduct a poll unless a majority of its employees have first expressed a specific desire to repudiate an incumbent union. An employer, in other words, is free to poll its employees, but

only when it already knows the results of that poll. As the dissenting judge noted below, that result gives new meaning to Dickens' phrase "the law is a ass." The Board's contradictory matrix of rules governing workplace polling is arbitrary and capricious, and hence invalid under basic principles of administrative law.

Even if the Board's polling standard could survive routine "arbitrary and capricious" review, moreover, the Board lacks the statutory authority to restrict non-coercive polling. The Board in this case invoked its power under § 8(a)(1) of the National Labor Relations Act, which makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their statutory right to self-organization. 29 U.S.C. § 158(a)(1). But a poll (like the one involved here) that is concededly non-coercive under the Board's own rigorous standards cannot be proscribed as an unfair labor practice for the simple reason that it does not "interfere with, restrain, or coerce" the exercise of any employee rights. Indeed, any construction of the Act that would restrict employers from polling their employees in a non-coercive manner would, at the very least, raise First Amendment problems of the first order.

ARGUMENT

I. THE BOARD'S POLLING STANDARD IS ARBITRARY AND CAPRICIOUS.

The Board order under review in this case must be set aside, first and foremost, because it violates the bedrock administrative-law proscription against "arbitrary and capricious" agency action. *See* 5 U.S.C. § 706(2)(A). To be sure, "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). But a reviewing court need not, and must not, rubber-stamp agency

action. *See id.* That is especially true where, as here, Congress has required the courts to ascertain that challenged agency action is "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e), (f). The order in this case must be set aside because the Board's confusing and contradictory matrix of rules governing workplace polling simply defies reasoned analysis. *See, e.g., State Farm*, 463 U.S. at 42-44.

A. The Board's Standard Renders Polling Useless, and Thereby Makes It Effectively Impossible for an Employer to Establish "Good-Faith Doubt" Regarding Employee Union Sympathies.

The Board's order concluding that petitioner committed an unfair labor practice by polling its employees is fundamentally inconsistent with longstanding precedent holding that an employer enjoys the right (1) to poll its employees in a non-coercive manner to determine their level of union support, and (2) to withdraw recognition from an incumbent union on the basis of a "good-faith doubt" regarding the union's majority status. To appreciate this inconsistency, it is necessary to understand the complicated matrix of legal rules governing this area.

For one year after certification or voluntary recognition and up to three years after entering into a collective bargaining agreement, a union typically enjoys an irrebuttable presumption of majority support. *See, e.g., Auciello Iron Works, Inc. v. NLRB*, 116 S. Ct. 1754, 1758 (1996); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 777-78 (1990). After that point, the presumption is subject to rebuttal; an employer can overcome it by proving that either "(1) the union did not *in fact* enjoy majority support, or (2) the employer had a *'good-faith' doubt*, founded on a sufficient objective basis, of the union's majority support." *Curtin Matheson*, 494 U.S. at 778 (emphasis added). *See also Stormor, Inc.*, 268 N.L.R.B. 860, 866-67 (1984). The employer's good-faith doubt, in other

words, has long been recognized as a complete defense to an unfair labor practice charge. *See, e.g., Windham Community Mem'l Hosp.*, 230 N.L.R.B. 1070, 1073 (1977), *enf'd*, 577 F.2d 805 (2d Cir. 1978); *Celanese Corp.*, 95 N.L.R.B. 664, 675 (1951); *E.A. Labs., Inc.*, 80 N.L.R.B. 625, 683 (1948), *enf'd as modified*, 188 F.2d 885 (2d Cir.), *cert. denied*, 342 U.S. 871 (1951). "The right of an employer lawfully to refuse to bargain if he had a good faith doubt as to the Union's majority status, *even if in fact the Union did represent a majority*, was recognized early in the administration of the Act." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 597 n.11 (1969) (emphasis added) (citing *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 868 (2d Cir.) (L. Hand, J.), *cert. denied*, 304 U.S. 576 (1938)). *See also Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263 (1949), *enf'd as modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); *Robeson Cutlery Co.*, 67 N.L.R.B. 481, 481, 499-500 (1946); *Sanco Piece Dye Works, Inc.*, 38 N.L.R.B. 690, 710-11 (1942).

Indeed, it is an unfair labor practice for an employer to confer exclusive representation status upon a union that enjoys only minority employee support. *See, e.g., Garment Workers v. NLRB*, 366 U.S. 731, 736 (1961). A good-faith belief in a union's majority status is no defense. *See id.* Thus, an employer should withdraw recognition from an incumbent union without delay as soon as it has a good-faith doubt regarding majority status. *See, e.g., Auciello*, 116 S. Ct. at 1760-61.

It is far from easy for an employer to rebut the presumption of continued union support. Under established Board precedent, one way is for the employer to prove that a majority of its employees of their own accord had approached the employer and expressed a specific and unequivocal desire to repudiate the union. *See, e.g., Phoenix Pipe & Tube, L.P.*, 302 N.L.R.B. 122, 122, *enf'd*, 955 F.2d 852 (3d Cir. 1991); *Destileria Serralles, Inc.*, 289 N.L.R.B. 51, 51-52 (1988),

enf'd, 882 F.2d 19 (1st Cir. 1989); *Bryan Mem'l Hosp.*, 279 N.L.R.B. 222, 225 (1986), *enf'd*, 814 F.2d 1259 (8th Cir.), *cert. denied*, 484 U.S. 849 (1987). The test is exceedingly demanding: indeed, the Board has held that the fact that a majority of employees responded negatively to the question of whether they "wish[ed] to remain in the Union" did not "express the unequivocal repudiation of a union which the Board requires to serve as the basis for a good-faith doubt of majority status." *Vic Koenig Chevrolet, Inc.*, 321 N.L.R.B. No. 168, at 6 (Aug. 27, 1996). Anti-union sentiments expressed during a job interview, general employee statements of dissatisfaction with the quality of union representation, or one employee's report of other employees' antipathy toward a union typically are insufficient. *See, e.g., Apparatus Serv., Inc.*, 296 N.L.R.B. 581, 583 (1989) (job interview); *Upper Miss. Towing Corp.*, 246 N.L.R.B. 262, 273-74 (1979) (general expressions); *Westbrook Bowl*, 293 N.L.R.B. 1000, 1001 n.11 (1989) (employees speaking for other employees). *See also New Associates*, 307 N.L.R.B. 1131, 1136 (1992) (employee-initiated decertification petition not sufficient to raise good-faith doubt regarding union's majority status), *enf. denied*, 35 F.3d 828 (3d Cir. 1994).

Because it is all but impossible as a practical matter (especially in large bargaining units) for a majority of employees to approach an employer to express a "specific desire" to repudiate an incumbent union, the Board has long recognized the validity of polling as an alternate means for an employer to ascertain the level of union support among its employees. *See, e.g., Taft Broadcasting*, 201 N.L.R.B. 801, 803 (1973); *A.L. Gilbert Co.*, 110 N.L.R.B. 2067, 2072 (1954). Over time, the Board has developed an array of procedural safeguards designed to ensure that any such poll is conducted in a fair and non-coercive manner. *See Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967). A poll is lawful, the Board has held, if (1) its purpose is to determine the validity of a union's claim of majority status, (2) that purpose is communicated to

the employees, (3) assurances against reprisals are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. *See id.* at 1063. Although *Struksnes* involved a pre-certification poll, the Board has applied its procedural safeguards to post-certification polls as well. *See, e.g., Lou's Produce, Inc.*, 308 N.L.R.B. 1194, 1204 (1992), *enf'd*, 21 F.2d 1114 (9th Cir. 1994); *Hajoca Corp.*, 291 N.L.R.B. 104, 1121-3 (1988), *enf'd*, 872 F.2d 1169 (3d Cir. 1989); *Hohn Indus.*, 283 N.L.R.B. 71, 71 n.2 (1987).

The dispute in this case arises from the Board's further holding that an employer seeking to poll its employees after certification without committing an unfair labor practice must not only comply with the *Struksnes* safeguards but *also* must show "a reasonable basis for believing that the union has lost its majority [status] since its certification." *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 717 (1974). Because that standard is, by the Board's admission, *precisely the same standard that governs an employer's ability to withdraw recognition from an incumbent union*, the *Montgomery Ward* polling standard created the anomaly at issue here: an employer cannot poll its employees unless it already knows the results of that poll.

Over the years following *Montgomery Ward*, three federal courts of appeals refused to enforce orders applying the Board's stringent polling standard. *See, e.g., Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984); *Thomas Indus., Inc. v. NLRB*, 687 F.2d 863, 867 (6th Cir. 1982); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141, 1144 (5th Cir. 1981). In light of these judicial rebukes, the Board in 1989 reconsidered *Montgomery Ward*. *See Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989), *enf'd in part on other grounds*, 923 F.2d 398 (5th Cir. 1991). By a divided vote, however, the Board decided to reaffirm *Montgomery Ward*, *see* 296 N.L.R.B. at 1059-63; *id.* at 1065-66 (Chairman Stephens, concurring), while at the same time reaffirming an

employer's "right" to poll its employees and disclaiming any desire to "do away with such polls," *id.* at 1061. The Board proceeded to apply the *Montgomery Ward/Texas Petrochemicals* standard in this case to hold petitioner guilty of an unfair labor practice, *see* Pet. App. at 20a-27a, 42a-60a, and a divided panel of the D.C. Circuit enforced that order, *see id.* at 3a-12a, 13a-18a (Sentelle, J., dissenting).

As the Fifth, Sixth, and Ninth Circuits have recognized, the Board's polling standard gives rise to two basic anomalies. *First,* the standard effectively outlaws polling *sub silentio* by allowing an employer to conduct a poll only when it already has enough information to render any such poll superfluous. *See, e.g., Mingtree Restaurant,* 736 F.2d at 1297 ("[T]he *Montgomery Ward* rule is tantamount to an outright prohibition of employer-sponsored polls."). The point of a poll, after all, is to allow an employer to ascertain whether it might be necessary or appropriate to withdraw recognition from an incumbent union. It makes no sense, thus, to allow polling in circumstances where an employer would already be justified in withdrawing recognition. "[T]he Board's position [is] untenable [because] an employer would only be allowed to take a poll under circumstances where no poll was necessary." *Thomas Indus.,* 687 F.2d at 867. *See also Mingtree Restaurant,* 736 F.2d at 1297; *A.W. Thompson,* 651 F.2d at 1144.

Even assuming that the Board had the statutory and constitutional authority to prevent an employer from conducting a non-coercive poll of its employees—an assumption that *amicus* challenges in Part II, *infra*—the Board may not do so by subterfuge. An administrative agency cannot, by semantic sleight-of-hand, outlaw a practice that it purports to permit. If the Board wishes to change course, it must at the very least do so forthrightly—and thus acknowledge and accept the legal and political consequences of its actions. *See, e.g., State Farm,* 463 U.S. at 41-42; *cf.* Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB*

Policymaking and the Failure of Judicial Review, 75 B.U. L. Rev. 387, 393-404 (1995).

Second, the Board's polling standard effectively abolishes the venerable "good-faith doubt" standard *sub silentio* by making it all but impossible for an employer to satisfy that standard. If an employer cannot poll its employees, the only way it can lawfully ascertain the level of union support is to wait for a majority of the employees to express a specific and unequivocal desire to repudiate an incumbent union. But that requires the employer to wait until it knows that a union does not *in fact* command majority support; it leaves no room whatsoever for a "good-faith doubt."

This anomaly did not escape notice during this Court's most recent foray into this area in *Curtin Matheson.* The Chief Justice highlighted the inherent tension between Board decisions "requir[ing] an employer to show that individual employees have 'expressed desires' to repudiate the incumbent union in order to establish a reasonable doubt of the union's majority status," and the Board's *Texas Petrochemicals* rule "prevent[ing] the employer from polling its employees unless it first establishes a good-faith doubt of majority status." 494 U.S. at 797 (concurring opinion). "I have considerable doubt whether the Board may insist that good-faith doubt be determined only on the basis of sentiments of individual employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments." *Id.* Justice Blackmun emphasized the same anomaly, observing that it places an employer in "a difficult bind." *Id.* at 799 & n.3 (dissenting opinion). That is something of an understatement: in fact, the Board's polling standard effectively destroys an employer's right to withdraw recognition from a minority union. Indeed, the standard places employers squarely in a "Catch-22": they are guilty of an unfair labor practice if they bargain with a minority union, *see, e.g., Garment Workers,* 366 U.S. at 736, but they also are

guilty of an unfair labor practice if they attempt to ascertain whether an incumbent union has lost majority support.[2] Whatever the Board's power to eliminate its longstanding "good-faith doubt" rule (a question that remains open, *see Curtin Matheson*, 494 U.S. at 788 n.8; *id.* at 800-01 (Blackmun, J., dissenting)), it plainly cannot do so by stealth.[3]

The upshot of these anomalies, of course, is not that the Board must allow unrestricted polling to rebut the presumption of majority support. Rather, the point is only that the Board

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[2] Although the Board and the court below attempted to deny this contradiction by asserting that an employer may safely rely on the presumption of continued majority support, *see Texas Petrochemicals*, 296 N.L.R.B. at 1062; Pet. App. at 7a, their assertion is hollow. An employer is statutorily forbidden from recognizing a minority union *regardless* of a good-faith basis for doing so. *See Garment Workers*, 366 U.S. at 736. The Board's assertion, moreover, ignores the destruction of the employer's statutory *right* (the corollary of its statutory *duty*) to withdraw recognition from a minority union.

For the same reasons, the Board cannot defend its polling standard on the ground that employees themselves have the right to petition for a Board-conducted election. *See Texas Petrochemicals*, 296 N.L.R.B. at 1062. Such petitions are not only cumbersome in practice—they must be signed by at least 30% of the employees, *see* 29 C.F.R. § 101.18(a)-(b)—but also have nothing to do with an employer's *right* and *duty* to withdraw recognition from a minority union. *See gener[illegible]ly* Note, *Employer Postcertification Polls to Determine Union Support*, 84 Mich. L. Rev. 1770, 1781-82 (1986).

[3] The AFL-CIO has previously urged this Court to reject the "good-faith doubt" standard altogether and to hold that an employer can withdraw recognition from an incumbent union *only* by showing an actual loss of majority status following a Board-conducted election. *See Curtin Matheson*, 494 U.S. at 788 n.8. That aggressive argument is not only misguided on the merits, but—most pertinent here—misdirected to this Court. The Board *has not remotely purported* to abolish the longstanding "good-faith doubt" rule. *See id.* (citing *Stormor, Inc.*, 268 N.L.R.B. 860, 866-67 (1984)). The validity of that rule is not before the Court in this case. Under fundamental principles of administrative law, agency action may be upheld only on the basis relied upon by the agency. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943).

cannot—without even purporting to ban polling or eliminate the good-faith doubt rule—set the *same* standard for polling as for withdrawing recognition from an incumbent union. As the Fifth, Sixth, and Ninth Circuits have sensibly recognized, the most stringent feasible polling standard is one that allows an employer to conduct a poll on the basis of "substantial, objective evidence [that] the union has lost support," even if such evidence would be insufficient by itself to justify withdrawal of recognition. *A.W. Thompson*, 651 F.2d at 1145. *See also Mingtree Restaurant*, 736 F.2d at 1299; *Thomas Indus.*, 687 F.2d at 867. The Board's current polling standard cannot survive even deferential "arbitrary and capricious" review.

B. The Board's Polling Standard Makes it Harder for an Employer Lawfully to Conduct a Poll than to Question Individual Employees.

In addition to the anomalies noted above, the Board's polling standard also leads to the curious result that it is harder for an employer lawfully to conduct a non-coercive poll of *all* employees than to question *individual* employees about their union sympathies. Under longstanding Board precedent, an employer has the right to "interrogate" individual employees as long as the questioning is not coercive. *See, e.g., Blue Flash Express, Inc.*, 109 N.L.R.B. 591 (1954). The coercion inquiry is governed by a multi-factor totality-of-the circumstances analysis. *See id.* at 594 (relevant factors include "[t]he time, the place, the personnel involved, the information sought and the employer's conceded preference"). Under that standard (or analogous standards applied by the courts of appeals), the questioning of individual employees "is not held to be an unfair labor practice unless it meets certain fairly severe" requirements. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) *(per curiam)*. *See also Architectural Glass & Metal Co., Inc.*, 107 F.3d 426, 434 (6th Cir. 1997); *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 366-68 (5th Cir. 1990); *NLRB v.*

Intertherm, Inc., 596 F.2d 267, 277-78 (8th Cir. 1979); *Teamsters Local 633 v. NLRB*, 509 F.2d 490, 493-95 (D.C. Cir. 1974); *cf. Rossmore House*, 269 N.L.R.B. 1176, 1178 n.20 (1984) (applying *Bourne* coercion standard), *enf'd*, 760 F.2d 1006 (9th Cir.1985).

Needless to say, it makes no sense for the Board to limit an employer's right to poll *all* employees more stringently than its right to question *individual* employees. If anything, employees need *more* protection when they are questioned one-on-one than when they vote *en masse* in a non-coercive poll. As noted above, *see supra* at 8-9, employer-sponsored polls are subject to a host of procedural protections, including secret balloting. No such categorical protections apply to individual questioning; there are—as yet—no *Miranda* warnings in this context. Indeed, the juxtaposition of the Board's *de facto* ban on polling with its flexible treatment of individualized interrogation is all the more startling "because the Board itself has recognized that a properly conducted secret ballot poll of an entire bargaining unit is inherently less coercive than the direct questioning of an individual employee." Note, *Employer Postcertification Polls to Determine Union Support*, 84 Mich. L. Rev. 1770, 1776 (1986) (citing *Struksnes Constr. Co.*, 165 N.L.R.B. 1062, 1063 (1967), and *Rossmore House*, 269 N.L.R.B. 1176 (1984)).

This confusion is exacerbated by the Board's failure to explain "where or why [it] draws the line between 'polling' and other types of 'interrogation' in individual fact scenarios." *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1359 (D.C. Cir. 1997). An employer cannot conduct a *de facto* poll by simply questioning employees individually—at some (undefined) point, individualized questioning is deemed to become a poll. "[T]he Board has rarely articulated its rationale for choosing 'polling' analysis over 'interrogation' analysis in particular decisions, and some of its choices between the two defy classification." *Id.* at 1360. Accordingly, it is virtually

impossible for an employer lawfully to ascertain whether a majority of its employees continue to support an incumbent union. The Board's conflicting decisions in this area leave employers mired in a "Serbonian bog." *NLRB v. Dan River Mills, Inc.*, 274 F.2d 381, 388 (5th Cir. 1960).

C. The Board's Justifications for its Polling Standard Are Unpersuasive.

The Board has attempted to justify its stringent polling standard by asserting that the standard (1) does not render polling useless, *see Texas Petrochemicals*, 296 N.L.R.B. at 1063, (2) prevents the anomaly of having a lower standard for polling than for Board-conducted elections, *see id.* at 1060-61, and (3) "promote[s] industrial and workplace stability" by protecting incumbent unions, *id.* at 1061. None of these asserted justifications, however, can save the standard.

1. The Board's Polling Standard Does Not Establish a "Safe Harbor" for Employers.

As an initial matter, the Board rejects the criticism that its polling standard effectively bans employer-sponsored polls by rendering them useless. *See id.* at 1063 (challenging reasoning in *Mingtree Restaurant*, 736 F.2d at 1297-98, *Thomas Indus.*, 687 F.2d at 867, and *A.W. Thompson*, 651 F.2d at 1144). Importing the stringent standard for withdrawal of recognition into the polling context, the Board declares, "provides an employer with a clear choice": it may either (1) withdraw recognition or (2) conduct a poll. *Texas Petrochemicals*, 296 N.L.R.B. at 1063. A poll remains a viable option, according to the Board, because it provides an employer with greater certainty regarding the level of union support among employees. "Rather than simply withdraw recognition from a union that might still in fact have majority support, an employer may wish first to poll its employees to obtain more certain, precise information about the union's support than is provided by its own reasonable doubt. The employer can then

act with confidence and certainty in light of the results of the poll." *Id.* The Board thus suggests that, even under its stringent standard, a poll operates as a sort of "safe harbor" for an employer uncertain about the propriety of withdrawing recognition from an incumbent union.

Any such "safe harbor," however, is wholly illusory. A poll is useful only as a means for an employer to determine whether to withdraw recognition. As long as the standard for polling and withdrawal of recognition is the same, a poll is meaningless: if the employer would not have been justified in withdrawing recognition, it would not have been justified in taking the poll. The certainty added by the poll, in other words, has no legal or practical effect. If an employer does not know whether a union has lost majority support, it commits an unfair labor practice either by conducting a poll or by withdrawing recognition. Indeed, in this case petitioner was charged with unfair labor practices on *both* grounds.[4]

2. The Board's Polling Standard Is Not Necessary to Protect the Utility of the Formal Election Mechanism.

The Board also asserts that its stringent polling standard—whatever anomalies it might create—is necessary to prevent the further "anomalous" situation that would allegedly arise if the standard for polling were lower than the standard

[4] The majority opinion below suggested that the Board could cure this fundamental anomaly "by raising [its] withdrawal-of-recognition standard." Pet. App. at 6a. That suggestion, however, provides no basis for upholding the challenged polling standard. As an initial matter, it is elementary that administrative action can be upheld only on the grounds provided by the agency. *See, e.g., Chenery*, 318 U.S. at 94-95. A court, in other words, cannot substitute its own justifications. *See id.* In any event, the possibility that the Board might at some future date resolve this anomaly cannot justify upholding the order issued against petitioner *in this case*, especially because it is probably impossible either in theory or in practice for the Board to raise any higher its standard for withdrawal of recognition.

for petitioning for a Board-conducted election. *See id.* at 1060. Unless the standard for polling is "at least as stringent as that for [Board-conducted] RM elections," the Board insists, an employer would have no incentive to petition for an election and the formal election mechanism would be undermined. *Id.*[5]

The most obvious answer to that argument is that the Board cannot justify one anomaly by conjuring up another. The various standards at issue here are not immutable truths of nature; they are simply a product of past Board decisions. An administrative agency, of course, cannot possibly prevail in a "battle of the anomalies" of its own creation. Indeed, the Board could readily cure the anomaly that results from applying the same standard to polling and withdrawal of recognition without in turn setting different standards for polling and RM elections: it could simply relax *both* the standards for polling and for elections. Perhaps there is a reason why the Board has refused to take that step, but, if so, that reason has never been articulated.

In any event, it is not true that it would be anomalous to set a lower standard for polling than for petitioning for an RM election. The legal consequences of polls and elections differ markedly. A poll is simply a mechanism for an employer to determine whether it is necessary and appropriate to withdraw recognition from an incumbent union. Following any such withdrawal, the union would remain free to challenge the poll and seek an election. An election, in contrast to a poll, is conclusive. It requires the Board's participation and carries not only the imprimatur of Board certification but also (if the union wins) a one-year irrebuttable presumption of majority status, or

[5] Employer-initiated elections are authorized by § 9(c)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 159(c)(1)(B), and are often called "RM elections" in light of the Board's internal classification system. *See, e.g.*, 1 P. Hardin, *The Developing Labor Law* 378, 383 (3d ed. 1992). They entail a host of procedural requirements. *See id.* at 414-47.

(if the union loses) a one-year statutory bar to another election. *See* 29 U.S.C. § 159(c)(3). It only stands to reason, thus, that a higher standard should apply to trigger an RM election than a poll.

Furthermore, even if the Board were correct that setting a lower standard for polls than for RM elections would create a disincentive for employers to petition for elections, that would in no way undermine the utility of the formal election mechanism. Unions and employees would always remain free to challenge polls by petitioning for an election. Employers themselves might prefer to request an RM election rather than face a challenge to a poll. Indeed, even the courts have long exercised authority to order elections to resolve disputes over withdrawals of recognition, some of them resulting from contested polls. *See, e.g., NLRB v. Albany Steel, Inc.*, 17 F.3d 564, 568, 571-72 (2d Cir. 1994); *Texas Petrochemicals v. NLRB*, 923 F.2d 398, 405-06 (5th Cir. 1991); *NLRB v. Superior Fireproof Door & Sash Co.*, 289 F.2d 713, 723 (2d Cir. 1961); *NLRB v. National Licorice Co.*, 104 F.2d 655, 658 (2d Cir. 1939) (L. Hand, J.), *aff'd*, 309 U.S. 350 (1940). In the final analysis, there is nothing wrong with an employer taking "reasonable steps to verify union claims" of majority support in order to "obviate a Board election." *Garment Workers*, 366 U.S. at 739. Polling simply happens to be the most reliable and efficient of such "reasonable steps."

3. The Board's Polling Standard Does Not Promote "Workplace Stability" in a Permissible Manner.

Finally, and most generally, the Board asserts that its stringent polling standard is necessary "to promote industrial and workplace stability." *Texas Petrochemicals*, 296 N.L.R.B. at 1061. "[P]olling employees about their continued support for an incumbent union is itself potentially, if not inherently, both disruptive of the collective-bargaining relationship

between an employer and a union and also unsettling to the employees involved." *Id.*

Those assertions cannot validate the Board's illogical standard. Although the Board surely enjoys a degree of discretion in evaluating "the complexities of industrial life," *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (internal quotation omitted), such discretion is by no means unbounded. Whatever the Board's policy preferences, it may not—under basic principles of administrative law—pursue them in a manner that is arbitrary or contrary to the governing statute. *See, e.g., State Farm*, 463 U.S. at 43-44.

Thus, even if the Board were correct that its polling standard is likely to "promote industrial and workplace stability" by making it difficult for an employer to challenge an incumbent union, that would not explain why that anomalous standard is preferable to an outright ban on polling. The issue in this case, after all, is not the validity of polling—a practice that the Board has not purported to outlaw—but rather the validity of the current regime whereby an employer is free to poll its employees, but only when it already knows the results of the poll. That regime makes no sense, and cannot be rationalized by platitudes about industrial peace.

The Board's "stability" justification also proves too much from a statutory point of view. *Any* rule that favors an incumbent union can be said to "promote industrial and workplace stability." Indeed, that goal would best be promoted by a rule imposing a perpetual irrebuttable presumption of majority support. But such a rule would undoubtedly be invalid in light of the emphasis on labor *democracy* in the National Labor Relations Act. Employees should not be forced to be represented by, and employers should not be forced to bargain with, a minority union. *See, e.g., Garment Workers*, 366 U.S. at 737-38. The Act is squarely premised on the principle of majority rule. *See, e.g., NLRB v. A.J. Tower Co.*,

329 U.S. 324, 331 (1946). A legitimate interest in "stability" is not a license to ignore democracy.

II. THE BOARD'S POLLING STANDARD LACKS ANY STATUTORY BASIS.

A. The Act Does Not Authorize the Board to Proscribe Non-Coercive Polling.

The Board order under review is not only arbitrary and capricious; it is also *ultra vires*. The Board expressly invoked its authority under § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), which prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees" in the exercise of their statutory right to self-organization. *See* Pet. App. at 26a n.9. The Board did not, however, conclude that the poll in this case involved any coercion or otherwise impinged upon the rights of petitioner's employees. Rather, the Board simply asserted that *any* poll conducted before an employer knows the outcome—regardless of how procedurally proper and non-coercive—*per se* amounted to an unfair labor practice proscribed by § 8(a)(1). *See* Pet. App. at 25a-27a; *Texas Petrochemicals*, 296 N.L.R.B. at 1057.

The Court of Appeals deferred to the Board's polling standard on the theory that "[n]othing in the National Labor Relations Act specifically governs this practice." Pet. App. at 7a. While acknowledging that the Board's standard "has its faults," *id.* at 8a, the panel majority declared that "[t]he Board, not the courts, has the primary responsibility for developing and applying national labor policy," *id.* (internal quotation omitted).

The Court of Appeals framed the issue precisely backwards. An agency does not enjoy unfettered authority absent any specific restriction in its governing statute; rather, an agency enjoys only such authority as that statute specifically confers. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Public*

Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986). Thus, the Act's silence on the issue of polling does not authorize the Board to regulate the practice at will. The Board cannot deem a poll to be an unfair labor practice without first identifying a valid statutory source of authority. "[T]he statute must control the Board's decision, not the other way around." *NLRB v. Health Care & Retirement Corp.*, 114 S. Ct. 1778, 1784 (1994).

To be sure, the Board is entitled to judicial deference when interpreting ambiguous provisions of the Act. *See, e.g., Lechmere*, 502 U.S. at 536; *cf. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under the familiar *Chevron* analysis, the threshold question is whether the statute addresses the particular interpretive question at hand. If so, "that is the end of the matter," because both agencies and courts must implement statutory commands. *Chevron*, 467 U.S. at 842. If the statute is ambiguous, however, a court must defer to a reasonable agency interpretation. *See id.* at 843-44.

The Board's reliance on § 8(a)(1) as the source of its authority to implement a blanket proscription on non-coercive polling is misplaced. That provision authorizes the Board to proscribe as "unfair labor practices" only those actions by an employer that "interfere with, restrain, or coerce" the self-organization rights of its employees. 29 U.S.C. § 158(a)(1). It necessarily follows that the Board cannot proscribe as an "unfair labor practice" any and all *other* actions by an employer. Employer actions (including polls) that do not "interfere with, restrain, or coerce" employees' self-organization rights simply do not fall within the scope of § 8(a)(1). "[M]ere polling as to union sentiment cannot abstractly be declared to constitute a violation of Sec. 8(a)(1)." *NLRB v. Protein Blenders, Inc.*, 215 F.2d 749, 750 (8th Cir. 1954). Before the Board can hold an employer guilty of an unfair labor practice for conducting a poll (or otherwise

questioning its employees about their union sympathies), in short, it must first establish that the employer's actions in some way infringed upon the employees' right of self-organization. *See, e.g., General Mercantile & Hardware Co. v. NLRB*, 461 F.2d 952, 954 (8th Cir. 1972); *NLRB v. Miami Coca-Cola Bottling Co.*, 382 F.2d 921, 924 (5th Cir. 1967); *NLRB v. Associated Dry Goods Corp.*, 209 F.2d 593, 595 (2d Cir. 1954); *Wayside Press v. NLRB*, 206 F.2d 862, 864 (9th Cir. 1953); *NLRB v. Tennessee Coach Co.*, 191 F.2d 546, 555 (6th Cir. 1951); *Sax v. NLRB*, 171 F.2d 769, 772-73 (7th Cir. 1948).

The Board in this case failed to establish anything of the kind. There is no question that petitioner's poll satisfied the Board's rigorous *Struksnes* standards for procedural fairness. It was conducted by none other than a *priest*. The Administrative Law Judge specifically found that "there is nothing in the evidence . . . to indicate that there was anything questionable or coercive about the poll." Pet. App. at 60a; *see also id.* at 58a-59a. The Board itself in no way purported to find that the poll "interfere[d] with, restrain[ed], or coerce[d]" petitioner's employees in exercising their right to self-organization. Accordingly, the Board had no power in this case to hold petitioner guilty of an unfair labor practice. "[T]he Act's provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 (1965). Because the Board overstepped its statutory bounds, the Court of Appeals erred by deferring to the Board's interpretation of the statute. "Deference to the Board cannot be allowed to slip into judicial inertia." *NLRB v. Financial Inst. Emp'ees*, 475 U.S. 192, 202 (1985) (internal quotation omitted).[6]

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[6] Even assuming, *arguendo*, that § 8(a)(1) could be read to authorize the Board to proscribe non-coercive polls, the Board's incoherent and (continued...)

B. Any Interpretation of the Act that Would Authorize the Board to Proscribe Non-Coercive Polling Would, at the Very Least, Raise Serious First Amendment Questions.

Indeed, any interpretation of the Act that would authorize the Board to proscribe non-coercive polling would, at the very least, raise serious First Amendment questions. Employers, no less than other citizens, enjoy the right to freedom of expression. *See, e.g., Gissel Packing*, 395 U.S. at 617; *Thomas v. Collins*, 323 U.S. 516, 532 (1945); *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 478 (1941). That right is guaranteed not only by the First Amendment, but also by § 8(c) of the Act, 29 U.S.C. § 158(c), which "implements the First Amendment" by establishing "an employer's free speech right to communicate his views to his employees." *Gissel Packing*, 395 U.S. at 617.[7]

The Board, however, has long held that the protections of § 8(c)—and, by extension, the First Amendment—are not implicated when an employer seeks to poll or otherwise question its employees about their union sympathies. According to the Board, such employer activities are not expressive in nature. "[A]n employer, in questioning his employees as to their union sympathies, is not expressing

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[6] (...continued)
contradictory rules on polling do not reflect a reasonable interpretation of the statute for the reasons set forth in Part I, *supra*. *Cf. National Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 726-27 (D.C. Cir. 1994) (Silberman, J.) (noting overlap between second step of *Chevron* inquiry and conventional "arbitrary and capricious" review).

[7] Section 8(c), which was added to the Act by the Taft-Hartley Amendments of 1947, provides in pertinent part as follows: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

views, argument, or opinion within the meaning of Section 8(c) of the Act, as the purpose of an inquiry is not to express views but to ascertain those of the person questioned." *Struksnes*, 165 N.L.R.B. at 1062 n.8. *See also Cannon Elec. Co.*, 151 N.L.R.B. 1465, 1469 (1965) ("Interrogation, particularly systematic polling of employees as to their union sympathies, is not an expression of 'views, argument, or opinion' within the meaning of Section 8(c). The purpose of interrogation is not to express views, but to ascertain those of the person interrogated."), *overruled on other grounds, Resistance Tech.*, 280 N.L.R.B. 1004 (1986); *Standard-Coosa-Thatcher Co.*, 85 N.L.R.B. 1358, 1363 (1949) ("[W]e again reject the contention that interrogation is protected by Section 8(c) of the amended Act. . . . [T]he purpose of [§ 8(c)] is to permit an employer to express his views, not to license him to extract those of his employees.").

The Board has thereby evinced a seriously deficient understanding of the First Amendment. A question or solicitation, no less than a declarative statement, is a form of expression. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 765-66 (1993); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 628-32 (1980); *cf. United States v. Long*, 905 F.2d 1572, 1579-80 (D.C. Cir.) (Thomas, J.), *cert. denied*, 498 U.S. 948 (1990). Indeed, the Board's rationale for restricting employer polling and other forms of questioning—that such activities implicitly convey a message of anti-union animus—flatly contradicts the notion that such activities are non-expressive. *See Allegheny Ludlum*, 104 F.3d at 1363. A free and open interchange of ideas and information necessarily entails the ability to solicit the views of others. *Cf. International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 677-78 (1992); *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 788-89 (1988). The Board cannot, by simply reciting the mantra "industrial and workplace stability," muzzle an employer's freedom to communicate with its employees, at least insofar as such communication is truthful

and non-coercive. *See, e.g., Thomas*, 323 U.S. at 532; *Virginia Elec. & Power Co.*, 314 U.S. at 478; *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 277-78 (8th Cir. 1979); *NLRB v. Golub Corp.*, 388 F.2d 921, 926-29 (2d Cir. 1967) (Friendly, J.); *cf. 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1507-08 (1996).

Accordingly, the Board cannot, consistent with the First Amendment, prevent an employer from conducting a concededly non-coercive poll (like the one at issue here) to assess the level of union sympathy (or antipathy) among its employees. It necessarily follows that the Act must be construed in a manner that would avoid such an unconstitutional result. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575-78 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506-07 (1979). Indeed, this Court has repeatedly rejected the Board's efforts to characterize communicative activity protected by the First Amendment as an "unfair labor practice." *See, e.g., DeBartolo*, 485 U.S. at 577-78 (employee handbilling); *NLRB v. Drivers*, 362 U.S. 274, 284 (1960) (employee picketing).

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals for the District of Columbia should be reversed and enforcement of the Board's order should be denied.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZEIBERG
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street. N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN S. IRVING
Counsel of Record
CHRISTOPHER LANDAU
JEFFREY BOSSERT CLARK
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Amicus Curiae

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(10)

In the Supreme Court of the United States

October Term 1996

ALLENTOWN MACK SALES & SERVICE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ Of Certiorari To The United States Supreme Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

DANIEL R. BARNEY
WILLIAM H.H. HERRMANN, III
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314
(703) 838-1865

JAMES D. HOLZHAUER
Counsel of Record
TIMOTHY S. BISHOP
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Amicus Curiae

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QUESTION PRESENTED

Amicus American Trucking Associations, Inc., addresses the following question:

> Whether an employer with objective evidence that a bargaining representative has suffered a significant loss of employee support may conduct a fair and non-coercive poll of employees to determine if the bargaining representative continues to have the support of a majority of employees, without thereby committing an unfair labor practice.

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BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

The American Trucking Associations, Inc. ("ATA"), a not-for-profit corporation, is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interest of the trucking industry. The ATA membership includes more than 4,500 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 member companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts.[1/]

ATA, on behalf of a motor carrier industry employing millions of workers, is deeply interested in the proper interpretation and fair enforcement of federal labor laws by the National Labor Relations Board ("NLRB" or "Board"). The specific issue in this case is of direct concern to ATA and its members. Faced with objective evidence that a union previously certified or recognized as a bargaining representative has suffered a significant loss of employee support, ATA believes that an employer must be able to conduct a poll to determine whether the union still commands a majority. Otherwise, the employer risks bargaining with a union that repre-

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[1/] The written consents of the parties to the filing of this amicus brief have been filed with the Clerk.

sents only a minority of the workforce—bargaining which is contrary to the employer's economic interests, which may also constitute an unfair labor practice by the employer, and which is unfair to the majority of workers who do not desire the union's representation.

More generally, ATA has a strong interest in maintaining the legality of non-coercive, employer-initiated polling. As the number of union employees in the U.S. workforce has fallen, including in the trucking industry, labor organizations have increasingly turned to organizing tactics that circumvent the traditional secret ballot election process, thereby calling into question the quality and quantity of support for union representation among employees. An employer's right to poll its employees is one of the most conclusive ways to determine whether sufficient support exists to recognize a labor union as the exclusive bargaining representative, as well as to determine the continuing level of support for an incumbent union.

The history of the trucking industry is the history of the U.S. labor movement. The largest labor organization, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America ("Teamsters"), has its roots in organizing truck drivers. Teamsters' membership has risen and fallen with the market strength of organized trucking employers. Since the trucking industry was deregulated in 1980, a large number of niche trucking companies have entered the market to compete with the larger, organized motor carriers. Teamster membership began a substantial decline contemporaneous with deregulation, falling from 1.9 million in 1979 to 1.2 million in 1995. This drop in

membership has lead the Teamsters to turn to non-traditional methods of organizing to obtain representation status, including "corporate campaigns."

This new organizing strategy bypasses the traditional secret ballot election conducted by the Board. Instead, the union strives to coerce the employer into "voluntarily" recognizing the union. In such circumstances, non-coercive employer polling is one of the few tools available to demonstrate that a union has not garnered the support of a majority of the employees.

The Teamsters Union has publicly targeted ATA members for corporate campaigns. Consequently, ATA's participation as amicus curiae will give the Court a broader perspective on the important legal question presented in this case.

SUMMARY OF ARGUMENT

Amicus ATA urges this Court to reject as arbitrary and capricious the severe limitation on non-coercive polling adopted by the Board and approved by the court of appeals' majority in this case. By prohibiting polling except when the employer otherwise knows that the union has lost majority support, the Board has rendered polling virtually useless. The Board's restrictions on polling make no sense as a practical matter. To the contrary, they produce bizarre results like that in this case, where the employer has been held to have committed an unfair labor practice by conducting a procedurally impeccable poll that disclosed that only 40 per cent of bargaining unit members wanted to be represented by the union. There is no conceivable justification for prohibiting a practice that benefits employer and employee alike

by thus exposing a bargaining representative's minority status.

This Court should approve instead the position of the three circuits that have permitted polling where an employer has objective evidence of a significant loss of union support. Polling in those circumstances permits an employer who has reason to believe that the union *may* have lost majority support to obtain precise and reliable data as to the union's status—data that it would be difficult or impossible for the employer to obtain by other means. Allowing polling based upon evidence of a significant loss of support—subject to the procedural safeguards set out in *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967), which are designed to ensure that polling is fair and non-coercive—is essential if employers are to avoid the economic and legal harms that may result from bargaining with a union that does not represent a majority of bargaining unit workers, and furthermore serves to enhance employees' right of free choice.

ARGUMENT

I. THE BOARD'S REFUSAL TO PERMIT POLLING ON THE BASIS OF EVIDENCE OF A SIGNIFICANT LOSS OF SUPPORT FOR THE UNION DESTROYS IMPORTANT EMPLOYER AND EMPLOYEE RIGHTS AND IS IRRATIONAL

A. Polling Protects Substantial Employer And Employee Interests

Both employers and employees have substantial interests in ensuring that only a union with majority support is recognized as a bargaining representative. Employers are severely harmed by rules that foreclose reasonable efforts to determine the status of the union in at least two ways. To begin with, an employer bears an unnecessary and heavy economic burden when, as a result of Board policies that prevent it from accurately testing the level of union support, it is forced to bargain with a union that represents only a minority of the workforce. Second, an employer is at some legal risk of violating NLRA Section 8(a)(2), 29 U.S.C. § 158(a)(2), when it bargains with a minority union. The majority below described an employer's risk of violating Section 8(a)(2) as "nonexistent" on the ground that "the employer is protected by the presumption of the union's continuing majority status." Pet. App. 7. However, it would be surprising if that presumption afforded an employer complete protection, for when more than a year has passed since certification of the bargaining representative (or three years from the commencement of a collective bargaining agreement) the presumption may be rebutted. *Auciello Iron Works, Inc.* v. *NLRB*,

116 S. Ct. 1754, 1758 (1996); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 777-778 (1990).

Employees also are harmed when an employer's ability to test the level of support for the union is too restricted. "[T]he statutory goal of employee free choice" is obviously disserved when a union with only minority support acts as bargaining representative. *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1060 (1989). Logically, employee free choice is maximized when workers are given reasonable opportunities to indicate that they no longer support their bargaining representative and when an employer is permitted to withdraw recognition of the union based on that expression of its employees' wishes.

Current Board law gives grossly inadequate weight to these employer and employee interests in having the employer determine the status of a union that appears to be losing support. If the employer *already has objective evidence that the union has lost the support of a majority of bargaining unit members*, then according to the Board it may "simply withdraw recognition of the union; or it may seek a Board-conducted election—an 'RM election' —pursuant to § 9(c)(1)(B), 29 U.S.C. § 159(c)(1)(B); or it may conduct a poll of employees." Pet. App. 3. This scheme, however, merely gives lip service to what the Board itself has recognized as "an employer's right to poll." *Texas Petrochemicals*, 296 N.L.R.B. at 1061. To limit polling in this way makes it quite useless and redundant: as the Sixth Circuit explained, "[u]nder the Board's analysis, an employer would only be allowed to take a poll under circumstances where no poll was necessary; the only value of the poll would be to double-

check the employer's already sufficient evidence to refuse to bargain." *Thomas Indus., Inc.* v. *NLRB*, 687 F.2d 863, 867 (6th Cir. 1982); accord *Mingtree Restaurant, Inc.* v. *NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984) (under the Board's approach, "an employer in doubt of the union's majority status ..ould be allowed to take a poll only when it had no actual need to do so, that is, when it already had sufficient objective evidence to justify withdrawal of recognition"; that "is tantamount to an outright prohibition of employer-sponsored polls").

Polling's real utility, where there is an incumbent union, is as a means to gather evidence to meet the Board's standard for withdrawing recognition or conducting an RM election. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 41 n.8 (1987) (an employer's burden is to "'show that the union had in fact lost its majority status'" or to demonstrate "'a good-faith doubt based on objective factors that the union continued to command majority support'"). Polling is "a useful and legitimate tool when the employer's sincere doubt of the union's majority status is based on objective evidence which falls short of that needed to justify withdrawal of recognition." *NLRB* v. *A.W. Thompson, Inc.*, 651 F.2d 1141, 1145 (5th Cir. 1981). The requirement that any poll be based upon "substantial, objective evidence of a loss of union support" and that it comply with *Struksnes*' stringent procedural rules is, as the Fifth Circuit correctly determined, "a reasonable accommodation of the employer's interest in testing the union's support and the Board's interest in preventing repeated polls which themselves can be coercive." *Ibid.* The Board's view that polling should be restricted to circum-

stances in which the employer has no reason to poll, in contrast, is irrational.

B. Polling Is The Most Accurate And Least Disruptive Method To Determine The Union's Status

If polling cannot be used to gather data, it will often be difficult or impossible for an employer who knows that the union is losing support to take the necessary additional step to gather objective evidence that the union has lost its majority. Where an employer has objective indications that a union has suffered a significant loss of support, polling provides the most effective, most accurate, and least disruptive means to determine the union's status, which is in turn an essential predicate for taking the further actions of withdrawing recognition or calling for an RM election.

The Board's primary reason for so severely limiting polling appears to be its assertion that "polling employees about their continued support for an incumbent union is itself potentially, if not inherently, both disruptive of the collective-bargaining relationship between an employer and a union and also unsettling to the employees involved." *Texas Petrochemicals*, 296 N.L.R.B. at 1061. As a justification for the Board's prohibitive restrictions on polling, this assertion does not bear up to examination.

Without the ability to poll on the basis of objective evidence of a significant loss of support, an employer has two choices. It can simply continue to bargain with a union that is losing support and that may well represent only a minority of the bargaining unit, contrary to

its own economic and legal interests and to its employees' interest in free choice. Alternatively, it can attempt to obtain evidence that the union has lost majority support by means other than polling. That effort will be difficult, and it may sometimes be impossible. See *Curtin Matheson*, 494 U.S. at 797 (Rehnquist, C.J., concurring) (expressing "considerable doubt whether the Board may insist that good-faith doubt be determined only on the basis of sentiments of individual employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments"). It will certainly involve less direct and less reliable methods than polling. And it is difficult to imagine how the employer could gather the necessary information in a less "disruptive" and "unsettling" way than by a poll conducted in accordance with the safeguards mandated by *Struksnes*.

Once the employer has gathered evidence of loss of support by other means, it will likely withdraw its recognition of the union, as the Board's position permits. Only when the unfair labor practice charge is filed challenging the withdrawal of recognition—a charge almost certain to be brought—will the employer "find out whether the evidence of loss of support is sufficient to justify that withdrawal." *A.W. Thompson*, 651 F.2d at 1145. In other words, after gathering evidence of the union's status in a way that is very likely to be more disruptive than polling, the employer will withdraw recognition and then will face an unfair labor practice charge that will determine if its withdrawal of recognition is justified!

It is a mystery how the Board can suppose that this process is less disruptive than taking a poll that is based on objective evidence of significant loss of support for the union, that is conducted in accordance with *Struksnes*, and that produces concrete, reliable evidence as to the union's status. Certainly, the Board and the court below have not explained: notably missing from the opinions in this case and from the Board's defense of its position in *Texas Petrochemicals* is any discussion at all of how an employer is to gather objective evidence of loss of majority support if it cannot poll, of how "disruptive" or "unsettling" other methods of gathering this data might be in comparison with polling, or of how "disruptive" or "unsettling" it is to have the employer withdraw recognition to test the sufficiency of its evidence of loss of support.

It is quite clear, ATA submits, that polling is significantly *less* disruptive of the collective-bargaining relationship and less unsettling for employees than the odd and irrational scheme established by the Board. The Board's failure even to consider these issues is further indication that its polling rule is arbitrary and capricious and should not be accepted by this Court.[2/]

[2/] A second reason that the Board has given for its standard for polling is a desire to maintain the same standard for RM elections, employer polls, and withdrawals of recognition, because all three have the same consequence—loss of union recognition—and because the Board wishes to encourage use of RM elections. *Texas Petrochemicals*, 296 N.L.R.B. at 1060-1061. As even the court of appeals' majority recognized, this reasoning is internally inconsistent and deeply flawed. See Pet. App. 7-8. Far from encouraging employers to seek RM elections, the Board's approach encourages them simply to withdraw recognition, and to do so not on the basis of fair and accurate polling but on the basis of potentially less reliable data. The only way that the three techniques meld coherently together, ATA submits, is if polling is permitted, upon evidence of loss of support, as a method to obtain the data which may then form the basis of withdrawal of recognition or a request for an RM election.

II. THE BOARD'S REFUSAL TO PERMIT POLLING ON THE BASIS OF EVIDENCE OF A SIGNIFICANT LOSS OF SUPPORT FOR THE UNION LEADS TO BIZARRE RESULTS

The facts of this case illustrate well the importance of "effectively preserving an employer's right to poll" its workforce about their support for their union. *Texas Petrochemicals*, 296 N.L.R.B. at 1061. Here, polling enabled the employer to determine that a union had ceased to represent a majority of the bargaining unit. The Board's and court of appeals' decisions that the employer thereby committed an unfair labor practice provides an excellent example of the absurd results that flow from a rule limiting employer polling to situations where the employer has no incentive to poll, while barring polling in situations where it can be of great use and where no other means to collect accurate information about the union's status is generally available.

After petitioner Allentown Mack Sales and Service, Inc. ("Mack") bought a truck dealership and repair shop in December 1990, it hired 32 of the previous owner's 45 unionized employees. Mack soon acquired a great

deal of evidence that Local 724 of the International Association of Machinists and Aerospace Workers AFL-CIO ("the union"), which represented those workers, had suffered a substantial loss of employee support. For example,

- In July 1990, a bargaining unit employee and union shop steward, Dennis Wehr, stated that after the new company took over "we didn't have to have a union, because we didn't need one" (Pet. App. 49);
- In December 1990, employee Rusty Hoffman stated that he would vote out the union and that if the new company was going to be union he did not want to work there (*id.* at 50);
- In a job interview with the new company, employee Joe McKilvie stated that he was against the union and that "we would work better without one" (*ibid.*);
- Also in job interviews, employee Milt Solt said that he considered the union a waste of $35 a month, and employee Dennis Marsh stated that he was not being represented for his $35 union dues (*ibid.*);
- In their job interviews, employees Tim Frank, Scot Murphy, and Kermit Bloch each stated that they did not want the union (*id.* at 51);
- Bloch, who worked the night shift, also stated that none of the five or six employees on the night shift wanted the union (*ibid.*);

- At his interview, employee David Baker said he had "no use for" the union (*id.* at 52);
- In December 1990, employee and union shop steward Ron Mohr stated that, "with a new company, if a vote was taken, the union would lose" (*id.* at 53).

On the basis of this substantial evidence that employees were dissatisfied with their bargaining representative, Mack polled employees in February 1991 to determine whether the union continued to enjoy majority support. As the Board decision in *Struksnes* requires, Mack gave its employees advance notice of the poll, "informed [employees] of the purpose of the poll," gave employees "assurances against reprisals," and implemented the poll "by secret ballot conducted by an independent third party." Pet. App. 59. Thus, the Administrative Law Judge found, the poll "was conducted within the guidelines of *Struksnes*" and not "in a coercive atmosphere." *Id.* at 58-59; see also *id.* at 60 (there was "nothing in the evidence * * * to indicate that there was anything questionable or coercive about the poll").

The poll fully justified Mack's suspicion, based on repeated statements of discontent by employees, that the union might have lost majority support. Only 13 of the 32 bargaining unit members—40 per cent—voted in favor of union representation. Pet. App. 2. Because the poll provided concrete evidence of the union's minority status, Mack refused to recognize the union as its employees' bargaining representative.

In the circumstances of this case, polling served a critical function. Absent the poll, Mack could not have

refused to bargain with the minority union. At the time the poll was conducted, the Board and court of appeals held, Mack did not have objective evidence that the union had lost the support of the majority. In consequence, Mack could not lawfully have withdrawn recognition of the union or sought a Board-conducted RM election. Without the poll, which allowed Mack to gather concrete, reliable data about the level of union support, Mack's employees would have continued to be represented by a union they did not want, and Mack would have had to continue to bargain with a minority union, in conflict with its own economic interests. Nevertheless, the Board and the court of appeals held that the poll and subsequent refusal to bargain were unlawful because the evidence Mack had when it took the poll did not give rise to a reasonable doubt that the union continued to enjoy majority support.

Judge Sentelle in his dissent accurately described this result as "bizarre" (Pet. App. 15), concluding that it was "arbitrary and capricious of the Board to find that [Mack] committed unfair labor practices in the face of overwhelming unrefuted evidence that the union lacked majority support, including a poll taken with the utmost in safeguards for fairness and objectivity." Pet. App. 18. ATA can imagine no valid purpose that is served by preventing an employer from conducting a poll in the circumstances of this case and then withdrawing recognition of the union when the poll shows that the employees do not want the union as their bargaining representative. Polling in this case worked just as polling should: to accurately determine the status of a union when there is evidence of loss of support but no other means readily available to the employer to gauge whether the loss of

support is so extensive that the union no longer commands a majority.

Ostrich-like, the Board seems intent on sticking its head in the sand so that it does not have to confront reliable information that a union no longer has the support of bargaining-unit employees. The Board's refusal to allow the collection of accurate information that serves employer and employee interests is, as Judge Sentelle remarked, "divorced from logic and from common sense." Pet. App. 15. The Board should carry a particularly heavy burden of justification when it tries to suppress reliable information and the means of gathering it. But far from meeting that burden, the Board has never produced even a plausible explanation of why highly accurate information about a union's majority status should be avoided and suppressed. ATA urges this Court to confirm that polling is indeed a legitimate information-gathering tool for an employer in possession of objective evidence that a union has suffered a significant loss of support, and hence to reverse the judgment below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DANIEL R. BARNEY
WILLIAM H.H. HERRMANN, III
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314
(703) 838-1865

JAMES D. HOLZHAUER
Counsel of Record
TIMOTHY S. BISHOP
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Amicus Curiae

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No. 96-795

In The
Supreme Court of the United States
October Term, 1996

Allentown Mack Sales and Service, Inc.,
Petitioner,
v.
National Labor Relations Board,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Jonathan P. Hiatt
Lynn Rhinehart
815 16th Street, N.W.
Washington, D.C. 20006

Marsha S. Berzon
177 Post Street, Suite 300
San Francisco, CA 94108

Laurence Gold *
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-8340
* Counsel of Record

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 75 national and international unions representing approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The question in this case is whether the National Labor Relations Board's rule limiting employer polls regarding employee support of incumbent unions to those circumstances in which an employer has a reasonable belief based on objective evidence that a majority of the employees no longer desire union representation is reasonable and consistent with the National Labor Relations Act.

A. The NLRA on its face provides only one route for employers who question whether an incumbent union continues to enjoy majority support to obtain an answer to that question, and, if the answer is "no", to withdraw recognition from the union. NLRA § 9(c)(1)(A), 29 U.S.C. § 159(c)(1)(A) provides that an employer may file a petition for a Board decertification election and, if a majority of employees vote against union representation, withdraw recognition. And, NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5), establishing the employer's obligation to bargain with a majority representative, contains no *scienter* limitation on that obligation. If anything, then, the Board's "good faith doubt" polling/unilateral withdrawal of recognition rule gives more, not less, rein to unilateral employer self-help in ending bargaining relationships than the Act provides in terms.

This conclusion is reinforced by *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974), in which this Court affirmed the Board's rule, altering an earlier position to the contrary, that employers can lawfully refuse to accord initial recognition to unions which, on every objective basis, have obtained and demonstrated majority employee support, but which have not prevailed in an NLRB representation election. The same considerations that led the Board and this Court to privilege exclusive employer reliance on Board elections in the initial recognition situation favor principal reliance on Board elections as the

means of ending a bargaining relationship once established. Indeed, in the withdrawal of recognition context there is an additional factor that militates against a broad privilege for employer unilateral actions predicated on the employer's belief that an incumbent union no longer has majority employee support: that "the Board is entitled to suspiction when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one." *Auciello Iron Works, Inc. v. NLRB*, 116 S. Ct. 1754, 1760 (1996).

Given this statutory scheme, the NLRB has no obligation freely to permit unilateral employer actions in withdrawing recognition from an incumbent union, thereby diminishing the paramount role of Board decertification elections in that regard.

B. Employer polls testing employee majority support of incumbent unions are moreover a direct threat to the employees' right of self-organization, and are properly limited to a very narrow range of circumstances for that reason as well.

Employer polls are conducted by an interested party that, unlike the NLRB, will be affected by the outcome, and is likely to favor one outcome—repudiation of union representation—over the other. Even where the employer poll is, as NLRB standards require, conducted by secret ballot, employer control over the entire voting process and the absence of the assurances of accuracy provided by the Board election processes undermine both the actual and the perceived reliability of the results.

The inherent faults of employer polls, and their potential for interference with employee self-organization, are at their height when the poll is conducted not in the initial organization context but to test the continuing employee majority support of an incumbent union. In the incumbent union context, simply by raising the issue

whether the status quo should change, the employer skews the balance by taking an action that can only be taken as an expression of the employer's own desire to be free of his bargaining obligation, interrupts that relationship, and creates internal employee divisiveness that can only destabilize that relationship further. And, of course, once the employer has withdrawn recognition based on an employer poll, the status quo regarding union representation is changed—and changed in a way that greatly weakens the union and the bargaining system in the employees' eyes. A Board election after the fact does not therefore provide a practical way of correcting any deficiencies in the employer poll.

C. Given the primacy of Board elections in the statutory scheme and the dangers to employee self-organization and to stable bargaining relationships posed by employer polls regarding an incumbent union's support, the Board's current rules regarding employer polling are both reasonable and consistent with the Act. Those rules permit employer polling to check other indications of loss of majority employee support for the union, a limited but useful purpose for employers who have a disinterested reason for ascertaining the employees' desides. Where that Board employer polling standard is met, the special dangers of employer polls are somewhat mitigated; where it is not, permitting polling creates a potent means for undermining lawful established bargaining relationships.

D. The Board's set of rules governing employer withdrawal of recognition from incumbent unions is not without flaws. But those flaws point in the direction of contracting, not expanding, the circumstances in which employer polling to test employee majority support for incumbent union as a way station to a unilateral employer withdrawal of recognition is permitted. As this Court has pointed out, "there is nothing unreasonable in giving a short leash to the employer as the vindicator of its employees' organizational fredom." *Auciello, supra*, 116 S. Ct. at 1760.

ARGUMENT

The Employer sets up its argument in this case through the following summary of a set of the relevant National Relations Act ("NLRA") decisional rules.

> Under Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), a union that represented the employees of an asset seller is presumed to represent the employees of the buyer, if a majority of the employees hired by the buyer previously worked for the seller. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). . . . The new employer can rebut the presumption of majority support and withdraw recognition by showing (1) that the union did not in fact enjoy majority support, or (2) that the employer had a good faith doubt, found on a sufficient objective basis, of the union's majority support. *Harley-Davidson Transportation Co.*, 273 N.L.R.B. 1531 (1985) . . . *See also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 779 (1990). . . . A withdrawal of recognition can be based on the results of a poll. *See, e.g., Paper Board Cores, Inc. of Ala.*, 292 N.L.R.B. 995, 1001-02 (1989). . . . In *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974), the Board held that an employer must have good faith doubt, based on objective considerations, as to the union's continuing majority status in order to conduct a poll. . . . [Brief for Petitioner ("Pet. Br.") at 9, 12.]

On the basis of this summary, the Employer maintains that the Board uses the "same standard" to determine whether an employer has sufficient evidence to conduct a poll as the Board uses "to determine whether there is sufficient evidence to process an employer-filed decertification petition (RM petition) or to determine whether an employer can lawfully withdraw recognition from a union." Pet. Br. at 13. And, the Employer further maintains that in order to "revitalize[] the good faith doubt branch of the withdrawal of recognition standard" (*id.*), the National Labor Relations Board ("NLRB") is *re-*

quired by the Act to allow employers to poll on less evidence showing a loss of employee support for their chosen union representative than the Board requires now.

In a nutshell, the employer-side argument that the Board's current approach is contrary to law and not within the range of the Board's discretion is: (1) that employers have some statutory right and/or obligation to involve themselves in their employees' decision whether to continue, or to end, the incumbent union's representative status; (2) that the Board only permits employers to withdraw recognition unilaterally if the employer acts on objective evidence supporting a reasonable belief that the union no longer enjoys majority support; (3) that employer-sponsored and administered polls are the most useful means of securing such evidence; and (4) that the Board therefore may not limit such polling with regard to employee support of incumbent unions to the narrow circumstances in which "the only value of the poll would be to double check" other evidence sufficient to support a reasonable belief that a majority of the employees no longer support their union representative. Pet. Br. at 14, quoting *Thomas Industries v. NLRB*, 687 F.2d 863, 867 (6th Cir. 1982).

The D.C. Circuit's succinct answer to this line of argument was "we do not understand why the [courts which have disapproved the Board's "incumbent union" polling standard] thought there was something wrong in the Board's having a standard that rendered polling only marginally useful to employers." *Allentown Mack Sales & Service v. NLRB*, 83 F.3d 1483, 1486 (D.C. Cir. 1996).

The Court of Appeals was quite right to be perplexed, for the employer argument outlined above has no predicate in the NLRA's language, structure, legislative history, or purposes. As we show, nothing in the NLRA requires that the Board provide *any* means for employer involvement in the employees' determination as to whether the

employees choose to continue, or to end, their union's representative status other than the means stated in NLRA § 9(c)(1)(B), 29 U.S.C. § 159(c)(1)(B). That section provides for a Board-conducted election, with Board-determined safeguards, on a proper employer petition.[2]

The Board has nonetheless, in an exercise of its administrative discretion, recognized some limited employer privilege, where there has been no Board conducted decertification election, to withdraw recognition from an incumbent union on the basis that a majority of the employees—in the employer's opinion—do not support the union.

Nothing in the statute requires that privilege, or mandates that the Board make the privilege broadly, rather than narrowly, available to employers who have some basis for thinking that their employees may no longer desire union representation.

Moreover, the Board has provided perfectly cogent, detailed explanations, over the years, for concluding that employer-run elections generally, including employer polls, are less accurate than Board-conducted elections and are for that reason, as well as others, likely to interfere with employee self-organization, and for regarding employer

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[2] "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative [of a majority of the employees in the unit] . . . the Board shall investigate such petition and, if it has reasonable cause to believe that a question of representation affecting commerce exists," shall hold a hearing and, if there is a question concerning representation, "shall direct an election by secret ballot and shall certify the results thereof."

The statute also provides for Board elections at the behest of "a group of employees" who "assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a [majority] representative . . ."

polling with respect to the majority status of incumbent unions as particularly problematic.

Specifically, the NLRB's consistent position, reaffirmed in *Texas Petrochemicals Corp.*, 296 NLRB 1057 (1989), has been (1) that such employer polls "interfere with . . . rights guaranteed in [§ 7 of the NLRA, 29 U.S.C. § 157]" within the meaning of § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), except in the unusual circumstance in which the employer has reason to believe, based on objective evidence, that a majority of the employees in the relevant bargaining unit no longer support the union; and (2) that an employer who refuses to bargain with an incumbent union on the basis of an employer poll not within the narrow exception violates § 8(a)(5), 29 U.S.C. § 158(a)(5).

The Board's conclusion that employer polls questioning the employees' continued majority support of incumbent unions should be permitted only in very limited circumstances is well-grounded in the statute and in reason. Indeed, the Board's limitations on employer polling in support of unilateral employer withdrawals of recognition are at least as much the result of a permissible exercise of the Board's "authority to formulate rules to fill the interstices of the broad statutory provisions" (*Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978)), as the underlying rule permitting such unilateral withdrawals of recognition. And since "[t]he only issue here relates to [the] polling [standard]" (83 F.3d at 1487), these considerations, elucidated below, provide a more than sufficient basis for affirming that standard, the Employer's attempt to drag in issues concerning the precise standards governing employer "RM" decertification petitions and unilateral employer withdrawals of recognition notwithstanding.

A. The Employer's argument rests on the premise that the Board's polling rule is improper because the rule limits the circumstances in which employers may unilaterally

withdraw recognition from an incumbent union without invoking the RM decertification provisions of the Act. But, it is far from clear that the NLRA provides for any such unilateral employer privilege—based upon the employer's beliefs concerning the employees' desires on continued union representation—to terminate the continuing statutory duty to recognize and bargain with a union duly designated by the employees as their exclusive representative, much less for the broader privilege the Employer here asserts. *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 779 (1990), Brief for the American Federation of Labor and Congress of Industrial Relations as *Amicus Curiae* Supporting Petitioners in *Curtin Matheson, supra.*[8]

The parties to this case have, however, assumed that it is a permissible construction of the NLRA for the Board to privilege employers at certain times and under certain conditions unilaterally to terminate their duty to recognize and bargain with an incumbent exclusive representative, based upon the employer's good faith doubt of the union's majority support, and we therefore do so as well.

But that assumption does not change the fact that both the "good faith doubt" rule and the "unilateral employer withdrawal of recognition" rule are creatures of the NLRB's administrative discretion, rather than creatures of the Act itself, and that fact is, we submit, of paramount significance in evaluating the Employer's argument that the Board's "good faith doubt" rules as applied to employer polling are contrary to law.

1. By its terms, NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) provides that

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[8] In *Curtin Matheson*, this Court specifically "declined to address that issue," as both parties in that case assumed the existence of such an employer privilege, and it was challenged only by the AFL-CIO as *amicus curiae*. 494 U.S. at 788 n.7. The issue is now *sub judice* before the Board itself in *Chelsea Industries, Inc.*, NLRB No. 7-CA-36846.

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a).

NLRA § 9(a), 29 U.S.C. § 159(a), in turn, provides that

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representative of the employees in such unit for the purposes of collective bargaining.

Taken together, then, these two provisions obligate employers to bargain with representatives "designated or selected . . . by the majority" of the employees in appropriate bargaining units.

Once so designated or selected, the exclusive representative enjoys a conclusive presumption of majority support during certain periods, including the term (up to three years) of a collective bargaining agreement, and a rebuttable presumption of such support otherwise. *Auciello Iron Works, Inc. v. NLRB*, 116 S. Ct. 1754, 1758 (1996). Here, the rebuttable presumption is applicable, since no collective bargaining agreement is in place. That presumption "enable[s] a union to concentrate on obtaining and fairly administering a collective bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 39 (1987). And, as the Court has emphasized, that presumption is of particular importance in a situation such as this one, where there is a successor employer who has hired a majority of the predecessor's employees:

> The rationale behind the presumption [of majority support] is particularly pertinent in the successorship situation. . . . During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it. While being concerned with the future of its members with the new employer, the union also must protect whatever rights still exist for its members under the collective bargaining agreement with the predecessor employer. Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor. [482 U.S. at 39.]

At the same time, the NLRA does provide a direct route through which an employer who questions whether an incumbent union indeed continues to enjoy majority support can petition for an NLRB-conducted representation election to test the employees' desire for continued representation, NLRA § 9(c)(1)(B), as well as a procedure through which disaffected employees can petition for such an election, NLRA § 9(c)(1)(A)(ii). In either event, the NLRB is instructed by § 9(c)(1) to "investigate such petition" and, if the Board finds that "a question of representation exists," the Board is to "direct an election by secret ballot."[4]

If, in such an election, a majority of the employees vote against representation by the incumbent union, the NLRB "shall certify the results"; doing so terminates the union's status as the employees' § 9(a) exclusive representative. And, since the § 8(a)(5) duty to bargain is "subject to

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[4] In this context, as in the context of petitions filed in initial recognition situations, the NLRB has developed a set of rules for determining whether a "question of representation" exists and an election should be held. Generally speaking, if a petition is filed by employees, the NLRB requires a 30% "showing of interest" (the same showing required in the initial recognition election setting); if a petition is filed by an employer questioning an incumbent union's continuing majority support, the NLRB requires—in lieu of employee signatures—an employer showing of his basis for believing that the employees no longer desire union representation. *See United States Gypsum Co.*, 157 NLRB 652 (1966).

§ 9(a)," an NLRB certification that the union no longer has majority employee support terminates the employer's bargaining duty as well.

The § 9(c)(1) procedure is the *only* procedure Congress wrote into the Act by which the continuing employer duty to recognize and bargain with a union that has been "designated or selected" by the employer's employees may be terminated. And the entire point of this procedure—indeed, the basic point of the Act—is to create a regime of "freedom of choice and majority rule in *employee* selection of representatives." *Garment Workers v. Labor Board*, 366 U.S. 731, 739 (1961) (emphasis added).

Thus, a rule allowing unilateral employer withdrawals of recognition upon a showing of good faith doubt is doubly suspect. First of all, such a withdrawal rule creates a means by which employers can terminate a union's representative status and the employer's own duty to recognize and bargain *in addition to the one provided for in the Act*, and does so without any statutory predicate. Second, the good faith doubt rule, by focusing on the reasonableness of the *employer's* belief as to the *employees'* desires rather than on the *employees' real* desires, permits majority employee sentiment to be frustrated where the employer's doubt is reasonable but *wrong, viz.*, where the employees in fact still desire union representation despite the employer's reasonable belief to the contrary. The language of § 8(a)(5), quoted above, certainly does not suggest any such *scienter* limitation on the employer's obligation to bargain with "the [§ 9(a)] representative of his employees."

If anything, then, the good faith doubt rule runs *against* the grain of the statute. At a minimum, nothing in the statute commands that the Board expand rather than narrow the circumstances in which employers may refuse to continue to recognize and bargain with an incumbent union based simply on the employer's belief, reasonable or otherwise, about the employees' desires concerning union representation.

2. There is also a tension between the rule allowing unilateral employer withdrawal of recognition upon a showing of good faith doubt and the decisions of the NLRB and of this Court concerning the rules governing the initial recognition of a union as an exclusive bargaining representative.

There was a time when the Board was of the view that such means of establishing majority support as authorization cards, responses by employees to a poll, or participation by employees in a strike for recognition were on a par with a Board-conducted representation election. Under this regime, as announced in *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *enf'd as modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951), where an employer had no "bona fide doubt" as to such a showing of majority support by a union seeking recognition, the employer was obligated to recognize and bargain with the union forthwith and could not insist upon a representation election. 85 NLRB at 1265.

The "good faith doubt" rule as to when an employer lawfully may *withdraw* recognition of an incumbent union unilaterally originated as a direct corollary of the *Joy Silk Mills* rule. In *Celanese Corp.*, 95 NLRB 664 (1951), the Board "could find no reason in law or policy which calls for the conclusion that a good faith doubt of majority is no defense to a refusal to bargain after the certificate year any more than is true in cases where there is no certificate." *Id.* at 672 n.16.[5] On that basis the Board concluded that good faith doubt should be the test not only for whether an employer's

[5] In this case, there was no initial certification but rather an informal recognition. That consideration does not alter the analysis, however, since, as *Celanese* shows, formal certification raises an absolute bar to a new election and to withdrawal of recognition for one year ("the certificate year"), but after that year is over raises only a presumption of majority support to the same degree, but no more, as voluntary employer recognition.

refusal to extend initial recognition to a union claiming majority support is lawful but also for whether an employer's refusal to continue to recognize such a union is lawful.[6]

In *Linden Lumber Division*, 190 NLRB 718, 721 (1971), *rev'd*, 487 F.2d 1099 (D.C. Cir. 1973), *rev'd*, 419 U.S. 301 (1974), the NLRB overturned *Joy Silk Mills* and held that employers can lawfully refuse to accord initial recognition to unions which, on every objective basis, have obtained and demonstrated majority support but which have not prevailed in an NLRB-run certification election. The Board's decision adopting this rule was sustained by this Court on appeal in *Linden Lumber Division v. NLRB*, *supra*.

The *Linden Lumber* rule rests on a complex of considerations. In part it is an expression of the concern—expressed by this Court one year before the Board decided *Linden Lumber*—that such employee actions as participating, or refusing to participate, in a union-called recognition strike are not sufficiently reliable indicia of the employees' desires on the question of union representation as to form a basis for required union recognition. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 604-09 (1969). Beyond that, the *Linden Lumber* rule reflects the understanding that a representation "election is a solemn . . . . occasion, conducted under safeguards to voluntary choice" (*Brooks v. Labor Board*, 348 U.S. 96, 99 (1954)); that the Board's election processes assure, as more informal means do not, that both the union and the employer have an opportunity to present their views to the electorate and to respond to each other's claims (*Gissel*, 395 U.S. at 602); and that, in

[6] *Celanese Corp.* modified *United States Gypsum Co.*, 90 NLRB 964 (1950), in which the Board had indicated that because "an employer who, in good faith, doubts the continuing status of his employees' bargaining representative may resolve such doubt by filing an employer petition," the employer ordnarily is not free to act unilaterally in withdrawing recognition. *Id.*, at 966.

consequence, the NLRA representation election system provides the surest means of avoiding decisions which are "the result of group pressures and not individual decisions" (*id.* at 602). Finally, the Board, and this Court, regarded it as appropriate to place the burden of seeking a Board election upon the party seeking to change the *status quo*—in the initial recognition situation, the union. *Linden Lumber*, *supra*, 419 U.S. at 307.

3. Despite the common origin of the *Joy Silk Mills* rule, which was repudiated by the Board in *Linden Lumber*, and the *Celanese* rule, the Board has not revisited the validity of the latter.[7] This Court's cases and the considerations underlying *Linden Lumber*, however, indicate at the very least that Board elections are the vastly preferable way for ending, as well as for beginning, bargaining relationships under the Act.

Unlike the rules governing most elections held in the American political system, the NLRA's provisions "do[] not say how long a certificate of representation shall stand good." *NLRB v. Whittier Mills Co.*, 111 F.2d 474, 478 (5th Cir. 1940). It has long been understood, however, that a Board certification (or voluntary employer recognition)

> is not intended to be ephemeral, nor should it be perpetual. On general principle, since *it ascertains a status as existing*, the presumtion is that that status continues until *shown to have ceased*. The employer is, in theory at least, not much concerned since the employees are to choose their representative unhindered. So long as *the employees* make no contention that they are not correctly represented, it would seem that the employer could safely continue to deal indefinitely with the designated bargaining agent [111 F.2d at 478 (emphasis added).]

[7] As noted (n.3, *supra*), there is a case currently pending in which the General Counsel is requesting that the Board revisit *Celanese*.

Thus, while "[t]he Act recognizes that employee support for a certified bargaining representative may be eroded by changed circumstances" (*NLRB v. Financial Institutions Employees ("FIEA")*, 475 U.S. 192, 198 (1986)), the NLRA does not require that an incumbent union reestablish its majority support periodically, much less that the union must do so whenever the employer chooses to question that majority. Rather, as this Court also held in *FIEA*, the Act provides for an orderly procedure for revoking a previous bargaining authorization, and places the burden for invoking that procedure upon *those seeking the revocation*:

> In such cases, employees may petition the Board for another election, alleging that the certified representative no longer enjoys majority support. 29 U.S.C. § 159(c)(1)(A)(ii); 29 CFR §§ 101.17, 102.60(A) (1985). Similarly, an employer who questions whether a majority of employees continue to support a certified union may petition for another election. 29 U.S.C. § 159(c)(1)(B); 29 CFR § 101.171102.60(a) (1985); see 1 C. Morris, The Developing Labor Law 349 (2d ed. 1983). The employer, however, must "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." *United States Gypsum Co.*, 157 NLRB 652, 656 (1966); 29 CFR 101.17 (1985); see Morris, *supra*. Again, if the Board determines, after investigation and hearing, that a question of representation exists, it directs an election by secret ballot and certifies the result. 29 U.S.C. § 159(c). [*FIEA*, 475 U.S. at 198.]

And, as the *FIEA* Court also indicated, it is contrary to the statutory scheme to permit established bargaining relationships to be disestablished by less rigorous and reliable means, such as employer self-help on the basis of employer polls not subject to the Board's election rules or supervision:

> Under the Act, the certified union must be recognized as the exclusive representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the [situation is one which] raises a question of representation and if so conducting an election to decide whether the certified union still is the choice of a majority of the unit.
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> *Any uncertainty on the employer's part does not relieve him of his obligation to bargain collectively.* "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief. . . ." [*FIEA*, 475 U.S. at 202, 209, quoting *Brooks v. Labor Board*, 348 U.S. at 103 (emphasis added).][8]

As *FIEA* suggests, the considerations that have led the Board and this Court to accord primacy to the NLRA representation election procedure apply with equal force where questions arise as to an incumbent union's continuing majority status. The termination of a bargaining relationship is as weighty a matter as the initiation of such a relationship and thus calls for "a procedure no less solemn than that of the initial designation." *Brooks v. Labor Board*, 348 U.S. at 99. Evidence of anti-union sentiment by union-represented employees expressed outside of the NLRA representation election system is no less ambiguous or unreliable than evidence of pro-union sentiment by unorganized employees. And, the lack of Board supervision and of well-developed rules governing both the pre-election campaign period and the conduct of the election itself can

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[8] This Court has, as noted earlier, recognized that the Board has administratively added to the provisions for withdrawing majority support that appear in the statute. *FIEA*, 475 U.S. at 200, n.8; *Curtin Matheson*, *supra*; *Auciello*, *supra*, 116 S. Ct. at 1758. As the quotations from *FIEA* quoted in the text indicate, however, this Court has nonetheless regarded Board elections as the primary, if not the only, route for negating the obligation to bargain with an incumbent union.

only create doubt as to the honesty and reliability of such an employer test of employee sentiment.

Indeed, in the withdrawal of recognition context there is at least one additional consideration that militates against according employers a broad privilege to act on their beliefs as to the employees' choice on union representation. As this Court has several times recognized, an employer who questions a union's continuing majority status "[i]n effect . . . seeks to vindicate the rights of his employees to select their bargaining representative." *Brooks v. Labor Board*, 348 U.S. at 103; *see also Auciello, supra*, 116 S. Ct. at 1760 (quoting *Brooks*). But employers are suspect champions of employee rights. Employers have obvious interests of their own that have nothing to do with vindicating employee free choice and everything to do with vindicating the employer's desire to operate non-union.

To be sure, in this case the Employer maintains that it is in fact seeking to advance not its employees' rights but "its own right under the Act not to bargain with a minority union." Pet. Br. at 27. There is no such open-ended NLRA right. Sections 8(a)(1) and (2) of the Act do, or course, prohibit employers from "a grant of exclusive recognition to a minority union." *Garment Workers, supra*, 366 U.S. at 738. But *Garment Workers* advances the interest of *employees* in their free choice of a bargaining representative, not any employer self-interest to be free of a bargaining obligation. And, this Court only last year rejected the proposition that the *Garment Workers* principle privileges *or* obligates "employer[s] [to] refuse to bargain whenever presented with evidence that their employees no longer support their certified union." *Auciello, supra*, 116 S. Ct. at 1760. Rather, once a union has properly obtained exclusive recognition, the union enjoys a rebuttable presumption of majority support (*id.*), and the employer is ordinarily protected by that presumption from committing an unfair labor practice as long as the

bargaining unit employees do not initiate decertification of the Union by the Board (*id.*). The proposition that employers *need* a broad privilege to unilaterally withdraw recognition from an incumbent union in order to protect themselves from a finding of having violated § 8(a)(2) by reason of their continued recognition of a minority union, rather than *want* such a privilege in order to forward their own institutional interest in being non-union, is further belied by the fact that an employer who does negotiate with a minority union, whether because he is mistaken about the union's majority support or otherwise, is not subject to any penalty or to any financial liability, but only to a prospective remedial order. *Garment Workers*, 366 U.S. at 740.

In sum, the only employer right recognized by the Act at all relevant here—and that is to stretch the term "right" to its limit—is the employer "right" to file an RM decertification petition and not to bargain with a union that the Board certifies is no longer a majority representative.[9]

Since "the Board is . . . entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one" (*Auciello, supra*, 116 S. Ct. at 1760), the Board is also entitled—at the very least—to structure the means of determining the continuing majority employee support for an incumbent union so as to provide a paramount place

[9] We are not aware of *any* case in which the Board has found that an employer has committed an unfair labor practice by continuing to bargain with an incumbent union, where no rival union is claiming majority support. And, as noted, an employer can seek an RM election based on evidence that the union lacks majority support. An employer who does so and fails to obtain an election because the Board concludes that there is insufficient evidence of loss of majority support to raise a "question concerning representation" safeguards himself against being found to have violated the Act by reason of his continued bargaining with the incumbent union. There is, in short, no statutory imperative to employer self help.

to the only such means provided by the statute, employee-initiated or employer-initiated Board-supervised decertification elections.

All of the foregoing demonstrates that the Employer's claim that the Board has some statutory obligation to provide employers an enhanced opportunity to unilaterally withdraw recognition from incumbent unions by freely permitting employer polls of their employees' union sentiments is at odds with the statutory scheme.

B. It is also to the point that employer polls regarding the employees' support for their incumbent unions are a direct threat to employee rights and are properly limited to a very narrow range of circumstances for that reason as well.

1. The NLRA makes it an unfair labor practice for an employer not only to "restrain" or "coerce" employees in their "right to *self*-organization," but also to "interfere with" that right. NLRA §§ 7 & 8(a)(1) (emphasis added).

The Board took the position at an early point that any form of employer-instigated inquiry into "the extent to which his employees have chosen to engage in union organization" can be seen as "intermeddling [or] intrusion" into "an area guaranteed to be exclusively the business and concern of his employees," and therefore employer "interference" proscribed by the Act. *Standard-Coosa-Thatcher Co.*, 85 NLRB 1358 (1949).

Under the *Joy Silk Mills* regime, however, an employer *did* have at least one strong, legitimate reason for determining the wishes of its employees regarding union representation. An employer faced with a union claim of majority employee support and a recognition request committed an unfair labor practice by failing to bargain with that union absent a good faith, objectively grounded doubt of the claim. In that one situation, then, the governing law all but required employers to ascertain their employees'

representational desires. That being so, the Board concluded that an employer can inquire into those desires without committing an unfair labor practice, provided there are adequate safeguards to assuage fears of reprisal. *Blue Flash Express, Inc.*, 100 NLRB 591 (1954). Those safeguards, as fully developed with regard to formal employer polls, included a purpose limited to "determin[ing] the truth of a union's claim of majority," communication of that purpose, a secret ballot, assurances against reprisals, and the absence of a "coercive atmosphere." *Struknes Construction Co.*, 165 NLRB 1062, 1063 (1967).

2. At the same time, from the earliest days of the Act, the NLRB "invariably followed the policy of disregarding in representation cases the results of elections conducted by employers," because "experience has shown" that an employer-run election is much less trustworthy than one conducted by the Board itself. *In re The Heller Brothers Company of Newcomerstown*, 7 NLRB 646, 657 (1938).[10]

The obvious difference between a Board election and an employer election (or employer poll), but one which deserves to be underscored, is that the employer, unlike the Board, is an interested party that will be affected by the outcome. The employer is indeed quite likely to have an interest in one particular outcome—repudiation of union representation. Related to that reality is the fact that even where that is not the case and the employer has no concern other than a fair reading of its employees' desires, employees are likely to perceive, or to fear, an employer bias toward a "no" vote. And, because the employer, unlike the Board, has a continuing relationship with the employees and power to affect their economic security, employees are likely to act upon their perception of the employer's wishes.

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[10] A union that loses a *Struknes* poll, for example, is not barred from seeking a Board election, although a loss in a Board election does preclude another election for a year.

The secret ballot requirement of *Struknes* was designed, it is true, to alleviate some of these concerns, by eliminating any direct employer knowledge of the votes of *individual* employees. But the employees may well have little confidence in the trappings of secrecy where the election is under the ultimate control of the employer. *The Heller Bros., supra,* 7 NLRB at 657 (noting the "possibility of hidden identification marks on the ballots" as one reason that employer control over the election process "preclude[s] the casting of a ballot which registers the free and independent choice of the employee"). While Board election procedures provide for election observers from all participating parties, thereby promoting confidence in the conduct of the election, employer polls are unlikely to provide similar protections. Unilateral employer control over all aspects of the election, including preparation of the ballot box, counting of the votes outside the sight of any union or employee observers, and post-election possession of the poll materials, all tend to exacerbate such concerns, and to undermine respect for the outcome of the vote as well.

Further, and critically, the presence or absence of majority employee support is not an abstract and relatively permanent attribute, any more than are the views of the electorate in a public election. Rather, the outcome of an inquiry into employees' union sentiment may turn in large part both on the opportunity of interested parties to explain their positions and to the manner in which the vote is conducted. And, running an election is not a mere ministerial task, but one that entails all manner of choices —choices an interested party is likely to skew, however subtly, toward the desired result.

Control over the precise timing and place of an election or poll, for example, can be exercised in a manner affecting the vote's outcome: The employer may wish to maximize or minimize the time for pre-poll campaigning; there may be considerations that affect which employees are likely to vote, such as planned vacations or work schedules; in large or multi-location workplaces, or where many

of the employees do much of their work off-site, the precise location of the polling place may have an impact on who votes, thereby affecting the outcome; and given the likely fluctuation in union support from day-to-day depending on workplace circumstances, the employer may be able to schedule the poll to coincide with some events likely to decrease union support (such as a failure to reach agreement at the bargaining table).

There are also likely to be disagreements concerning which employees are members of the appropriate unit and may be part of the poll. By deciding who is a supervisor and who is not, whether or not temporary or part-time employees can vote, and whether certain positions are or are not within the bargaining unit, the employer can affect the outcome of the poll and, just as importantly, may by their decisions communicate to the employees allowed to vote that the process is one designed to yield a foreordained result. Indeed, the very wording of the ballot question provides a means of signaling the result sought, and of skewing the outcome. *See, e.g., Cleveland Sales Co.*, 292 NLRB 1151 (1989) ("Do you think that Clesco still needs a union?"); *Hajoca Corp. v. NLRB*, 872 F.2d 1169 (3d Cir. 1989) (asked of strike replacement workers, "Do you consider Local 312 to be your representative?").

Finally, Board procedures provide affirmative protections developed over the years to promote an informed electorate and maximum voter participation. *See, e.g.,* 2 NLRB Casehandling Manual, Pt. 2, Representation Proceedings ("NLRB Manual"), at § 11302 (date, time and place of the election are selected to ensure maximum employee participation).[11] Employers conducting polls are unlikely to do the same.

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[11] Election notices are posted at least three working days prior to the election on the employer's premises; all parties are given a list of the names and addresses of eligible voters some time in advance of the election so as to facilitate communication with voters. NLRB Manual at 11312.1.

In a Board election, the union and the employer both have the opportunity to put a premium on strategic considerations in formulating their positions on the kinds of issues outlined above, but the neutral government agency, not the participants in the dispute, makes the ultimate decisions. And, the Board's goal in making its decisions is not to maximize the opportunity for one side or the other to prevail, but to provide the fairest and most accurate test of the employees' well-considered views concerning union representation. An employer poll is supremely unlikely to have the same goal, and in that respect as well as the others discussed above "interferes with" the employees' self-organizational rights.

In sum, as the Board has long recognized, in labor relations as in quantum mechanics an uncertainty principle is at work: employer "measurements" of employee sentiment on union representation do not accurately record that sentiment as it was—and as it would continue to be —absent the measurement; instead the employer's action, by its nature, changes the thing being measured—and by reason of that effect interferes with the employee right of self organization.

3. The faults of employer polls, and their inherent tendency to interfere with employee § 7 rights, are all greatly exacerbated when the poll is conducted not in the initial organizing context, as in *Struknes, supra*, but to test the continuing majority status of an incumbent union, as here. *See generally Montgomery Ward & Co.*, 210 NLRB 717, 723-725 (1974) (ALJ Opinion); *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1061-62.

In the initial recognition context, an employer faced with a demand for union recognition can simply refuse to bargain, no matter how strong the evidence of union support, and await the filing of an election petition by the union. *Linden Lumber, supra.* By polling, the employer in that context binds itself to the results of the poll if the union wins (*Atlantic Technical Services Corp.*, 202 NLRB 169 (1973)) and may end up bargaining with the union sooner rather than later, while the union is free to file for

a Board election should the employer poll result in a union loss. A vote against the union in such an employer poll will not result in any change in the status quo regarding union representation, so the very fact of a union loss will have no major impact on the role of the union during the pendency of any Board representation election that may follow. An employer who conducts a poll during an initial organizing campaign, consequently, does nothing to further his employer interests insofar as those diverge from the employee interests protected by § 7. And, that reality strengthens the case for the proposition that such employers may well be seeking nothing more than a prompt, informal resolution of the union representation question.

Where there is an incumbent union entitled to a presumption of majority support, however, the incentives facing an employer are entirely different. Simply raising the issue whether the status quo should be changed interrupts the established collective bargaining relationship by putting the union's status in question and requiring the union to concentrate on maintaining its representational rights rather than on representing the employees. And, putting the question of repudiating union representation to employees may lead to internal disagreements among the employees on a question they had regarded as settled, thereby undermining their internal cohesion and destabilizing the bargaining relationship.[12]

Further, where employee rejection of the union in an employer poll can be traced to the deficiencies in such polls identified above, reliance on the result would interrupt a bargaining relationship where that relationship would not have been interrupted by a Board election. And, while the union could thereafter file for a Board election (with an adequate showing of support), the status quo would have changed. The union would no longer be able to demonstrate its usefulness by providing repre-

[12] An employer who required employees to participate in a poll each and every year as to whether they wanted to continue union representation would, for these reasons among others, surely violate § 8(a)(1).

sentation to employees on the shop floor, and employees would no longer be in daily contact with the union. Any incumbent who loses an election is in a much weaker position in any subsequent election by reason of having lost the incumbency. Thus, a union once ousted is less likely to prevail in a later Board-conducted election, even if the union would have prevailed initially under the Board's more neutral and more accurate procedures.

C. Given the primacy of Board elections in the statutory scheme and the dangers to the employees' right of self-organization and to the stability of bargaining relationships posed by employer polls on the continuing majority support of an incumbent union, the Board's current rule regarding polling is both reasonable and consistent with the Act.

The Board's rule limits polling with regard to incumbent unions to the narrow—but no means insignificant—situation in which an employer has sufficient evidence to sustain a reasonable belief that a majority of its employees no longer desire union representation. Absent a poll, an employer considering whether to withdraw recognition has only such informal communications regarding majority support as employee statements and employee petitions. There is an inherent ambiguity about such statements, as the controversy in this case and many others regarding the meaning to be attributed to employee statements illustrates. In particular, when the statements are made to the employer, employees may well have reason to avoid revealing pro-union sentiment, and may speak in well-measured terms.[18] Nor can an employer presented with an anti-union petition or letters be certain that the signatures are genuine, or that the petition was not the result of group pressure.

[18] The circumstances of this case well illustrate this problem: Some of the statements the Employer relies upon as indicating anti-union sentiment by employees were made in hiring interviews with an Employer who had indicated an intention to operate non-union. Under those circumstances, it is not surprising that the employees would conclude that in order to get a job, it would be wise to convey the impression that they would not support union representation.

Because of these concerns an employer may poll as a check on the possibility that the expressions of employee sentiment on which the employer is prepared to act are unreliable, if not for his own legal safety then only to minimize the possibility of a new organizing campaign, as employees come to the judgment that the employer's action was hasty and ill-considered.

It may well be that the employer who is sufficiently concerned about ascertaining the real desires of its employees concerning continued union representation is rare, and that most employers faced with sufficient evidence to meet the Board's standards for withdrawal of recognition will take that step without going further to double check the accuracy of their information and the depth of their employees' feelings. But the Board is not obliged to tailor its administration of the Act so as to foster the interests of employers who wish to discourage union representation, to treat the more scrupulous employers as if they do not exist, or to make polling broadly permissible because it is sometimes permissible. And, for all the reasons surveyed above, the Board certainly has no obligation to foster unilateral employer withdrawals of recognition without a formal decertification election by making it easier for an employer to trigger an employer poll than a Board election.

It is worth noting as well that where a majority of the employees have indicated a lack of continued support for union representation, the special dangers of employer polls are somewhat mitigated. Under those circumstances, it is likely that the poll would be regarded by employees as addressed to an issue that the employees themselves have raised, rather than as an employer-instigated suggestion that the union be ousted. And, where a majority of the employees in the unit have affirmatively given some indication that they no longer want the union in the plan.,

it is likely that the bargaining relationship is already impaired, and that the poll itself will not cause the impairment.

In contrast, a Board rule allowing polling on a lesser showing of a loss of majority employee support, however phrased, would allow employers to seize on short-term fluctuations in the union's popularity parallel to the short-term fluctuations that show up in nearly all political approval polls. And, where the employer has no reasonable belief that the union has permanently lost the support of a majority of the work-force, any legitimate interest the employer has in ascertaining its employees' views disappears entirely, and the poll becomes nothing more than direct employer interference in employee self-organization.

C. We would be the last to claim that the Board's present set of rules governing employer withdrawal of recognition from incumbent unions is without flaws. But, as the Court of Appeals suggested (83 F.3d at 1347), the *most* congent criticism of the Board's incumbent union polling policy is not that it gives too little room to employer self-help through employer polls and unilateral withdrawals of recognition, but that it gives *far more room* for such self-help than the Board's own rationale would support. The Board could well—and in our view should—conclude that the various considerations favoring Board-supervised elections as a way to end employer bargaining obligations indicate that unilateral employer withdrawals of recognition—and polls as a way-station to such withdrawals—should both be entirely outside the pale. Indeed, now that the Board, with this Court's approval, has concluded in *Linden Lumber*, *supra*, that employers may insist upon Board-conducted elections before entering into a bargaining relationship, we can, to paraphrase *Celanese*, *supra*, "find no reason in law or policy which calls for the conclusion that a good faith doubt of

majority is [a] defense to a refusal to bargain after the certificate year [but not] . . . in cases where there is no certificate."

That the Board has chosen to provide a limited privilege for employers seeking to end a bargaining relationship to act without using the Board's processes, rather than no privilege at all, is hardly an appropriate basis for judicial imposition of a different rule *expanding*—rather than contracting—the availability of employee polling as a means of testing continuing employee majority support of their union. "There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organization freedom." *Auciello*, *supra*, 116 S. Ct. at 1760.[14]

[14] For related reasons, the Employer's various complaints about the manner in which the Board conducts RM elections—including the claims that the standard applied for determining whether the employer has raised a "question concerning representation" is too high, and the Board's blocking charge rules may preclude holding an election in a timely manner—are not relevant to the present case, and should not affect its outcome. If the Board's processes for holding RM elections are faulty (which we do not think they are in the respects the Employer maintains), then those defective RM election processes should be corrected. The Board's conclusion that employer polls threaten employee § 7 rights unless closely confined to a narrow range of situations cannot be held unreasonable or contrary to law on the basis that the Board could do better in running its own, statutorily-mandated elections.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

JONATHAN P. HIATT
LYNN RHINEHART
815 16th Street, N.W.
Washington, D.C. 20006

MARSHA S. BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

LAURENCE GOLD *
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record